TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 168.

JAMES H. CHAPMAN, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF ALFRED McCOY, APPELLANT,

vs.

ABNER T. BOWEN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED DECEMBER 16, 1907.

(20,483.)

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SUPREME COURT OF THE UNITED STATES.

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vs.

ABNER T. BOWEN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1905.

No. 1282

In the matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN,

Appellant,

vs.

JAMES H. CHAPMAN, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF ALFRED McCOY, BANKRUPT,

Appellee.

MR. L. D. BOYD,
MR. M. WINFIELD,

Counsel for Appellant,

MR. FRANK FOLTZ,
MR. SIMON P. THOMPSON,

Counsel for Appellee.

Appeal from the District Court of the United States for the District of Indiana.

1 IN THE DISTRICT COURT OF THE UNITED STATES,

For the District of Indiana.

In Bankruptcy.

In the matter of
Alfred McCoy,
Bankrupt. } No. 1770.

In the Matter of the Claim of Abner T. Bowen.

Certifi
Ques
Mar

Be it remembered that heretofore, to-wit: on the 2d day of March, 1906, before the Honorable Albert B. Anderson, Judge of said Court, a certificate of question in the above entitled matter was filed in the office of the clerk of said court, by John O. Bowers, one of the Referees in Bankruptcy of said Court, in the words following, to-wit:

I, John O. Bowers, one of the referees of said Court in Bankruptcy, to whom said matter has been referred and before whom the same is now pending, do hereby certify that in the course of said proceedings in said cause, upon the proofs of claims of and by one Abner T. Bowen against the estate herein, upon two certain promissory notes hereinafter described, and upon the motion of the trustee herein to disallow and expunge said claims, a certified copy of which proofs of debt, and a certified copy of which motion are hereto attached, the following questions arose, pertinent to said proceedings:

Where a firm consisting of two members doing business in the State of Indiana, and desiring to borrow money, executed promissory notes signed in the name of the firm and each of the partners thereof, to the money-lender, residing in New York, at which place the notes are payable, the firm having received the consideration, are the notes provable in bankruptcy proceedings not only against the firm estate, but against each of the individual estates?

evi- Summary of Evidence.

The evidence submitted under the written proofs of debt and the motions to disallow and expunge the same, together with the facts agreed upon by claimant and trustee and their respective attorneys, together with the uncontroverted facts set out in the proofs of debt, is in substance, as follows:

On the 20th day of August, 1903, Alfred McCoy and Thomas J. McCoy were engaged as partners in a general bank-
2 ing business in the City of Rensselaer, State of Indiana, under the firm name of and style of A. McCoy & Company. They were the sole members of the firm/.

On the said 20th day of August, 1903, said firm executed a promissory note payable in terms to Abner T. Bowen & Company, in the sum of five thousand dollars, which note was signed in the name of the firm and of each of the partners which note is in words and figures as follows, towit:

No. 35851.

"New York, Aug. 20th, 1903.

Ninety days after date, for value received, I promise to pay to the order of A. T. Bowen & Co, $5,000.00
Five thousand — — — — — — — — — — — — — — — Dollars, at the office of A. T. Bowen & Co, Bankers, 11 Wall St, New York, with interest at per cent. per annum from until paid.

Due.....

A. McCoy & Co.
Alfred McCoy.
Thomas J. McCoy."

The endorsement on the above note reads "Interest paid to Maturity. Paid Ninety & 45/100 dollars ($90.45) by balance of Account, April 1st, 1904".

On the 6th day of November, 1903, said firm doing business as aforesaid and composed solely of the persons aforesaid, executed another promissory note payable in terms to said A. T. Bowen & Co, signed in the manner aforesaid, which said note is in words and figures as follows, towit:

"New York, Nov. 6th, 1903, No. 36010.

Four months after date, for value received, we promise to pay to the order of A. T. Bowen & Co,————————$5,000.00
Five thousand — — — — — — — — — — — — — — — Dollars
at the office of A. T. Bowen & Co, Bankers, #11 Wall St.

New York, with interest at six per cent. per annum from maturity until paid.

Due March 6/04.

A. McCoy & Co.
Alfred McCoy.
Thomas J. McCoy."

P. O. Address.....

3 On the 18th day of June, 1904, separate petitions in bankruptcy were filed against the copartnership of A. McCoy & Company, Alfred McCoy and Thomas J. McCoy respectively, upon which said separate petitions said copartnership, and said Alfred McCoy and said Thomas J. McCoy were respectively adjudged bankrupts.

On or about the 11th day of May, 1905, said claimant filed two proofs of debt against the estate of A. McCoy & Company, upon the said notes respectively, which claims were allowed in the sums of $5085.00 and $5084.55 respectively, upon which claims as allowed, dividends were afterwards declared and paid.

Oral testimony was submitted in substance as follows:

The two notes in question were executed at the Bank of A. McCoy & Company at Rensselaer, State of Indiana, and forwarded by mail by said company to the said Abner T. Bowen at #11 Wall Street, New York, without any previous agreement upon the part of said Bowen to make these particular loans and without agreement upon the part of Alfred McCoy or Thomas J. McCoy to sign these notes in their individual capacity, although some conversation and understanding took place between said Bowen and the said Alfred McCoy in the year 1896 or 1897 relative to the signature by the individuals of notes, to the effect that said notes then or thereabouts to be executed, would be signed by said Alfred McCoy and his copartner individually, they then being the owners of about four thousand acres of land in their individual names.

At the time of the mailing of said notes respectively by said A. McCoy & Company to said Bowen, the said A. McCoy & Company stated that they would like to have the notes discounted and placed to their credit upon the books of said Bowen, who was then engaged in the banking business in the City of New York. Said Bowen upon receipt of said notes discounted the same and credited the account of said

A. McCoy and Company with the face of said notes respectively, less the discount thereof. The acceptance of the notes and the making of the loans upon the part of said Bowen took place in the State and City of New York. Upon deciding to make said loan, said Bowen notified said A. McCoy & Company that he would take the notes and place the amount thereof less the discount to their credit.

Said Bowen testified that in the making of said loan he relied more upon the individual responsibility of Alfred McCoy and Thomas McCoy than he did on the signature of A. McCoy & Company.

No arrangement or agreement had been entered into concerning the signature of notes executed after the year 1897.

Decisions by the Courts of the State of New York were offered in evidence, namely: In the matter of the Judicial Settlement of the estate of Charles B. Gray, deceased; Volume 111 page 404, N. Y. Reports:

Also in the matter of the estate of Henry Baldwin, deceased, Volume 170, page 156, N. Y. Reports:

The whole consideration for the execution of said notes was received solely by the firm of A. McCoy & Company, and no part of same was received by Alfred McCoy nor by Thomas J. McCoy in their respective individual capacities.

(Evidence submitted touching conversations prior to the execution of the notes, particularly that portion relative to the agreement in 1896 or 1897, is considered irrelevant by the Referee.)

The formal, verified proofs of debt based upon said notes respectively and filed by said claimant herein on the 8th day of May, 1905, are as follows:

At Delphi, in said District, on the 4th day of May, A. D. 1905, came Abner T. Bowen, of the City of New York, in the County of New York, and the State of New York, and made oath and says that Alfred McCoy, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said deponent in the sum of $5322.88; that the consideration of said debt is as follows:

Money loaned bankrupt to the amount of $5,000.00 evidenced by one promissory note for $5,000.00 executed on the 20th day of August, 1903, due ninety days after date, payable to the order of A. T. Bowen & Co., with interest at six per cent per annum from maturity, at the office of A. T. Bowen & Co. Bankers, 11 Wall Street, New York, said note fall-

5 ing due November 18", 1903, executed by A. McCoy & Co, Thomas J. McCoy and Alfred McCoy, that said promissory note was executed to and in favor of this deponent, who was at the date of said note, doing business in his individual capacity, under that firm name of A. T. Bowen & Co. at 11 Wall Street, in the City, County and State of New York aforesaid. Said original note is filed herewith and made a part hereto and marked Exhibit "A", that no part of said debt has been paid, except the interest to the maturity of said note, and $90.45, paid April 1st, 1904, said payments endorsed on the back of said note, that there are no set-offs or counter-claims to the same, and that the deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

And affiant further avers that at the time the note herein was executed and up to the present time, it has been and is the law of the State of New York, under the rules of law as determined by the highest Judicial Tribunal of said State, that where a promissaory note is executed by and in the name of a partnership, and for the sole benefit of such partnership, and in addition to the signature of the partnership, the separate members of such partnership join in the execution of such note by signing said note as individual makers thereof that the members of such partnership signing the note as aforesaid are severally bound, and each assume the liability of sole makers, because of the signing of his individual name to said note, and each one is bound to the same extent that he would be bound had the consideration of said note been for his sole benefit; that affiant accepted the note and loaned the money, relying on the individual liability of the partners as held in the State of New York.

(Signed) ABNER T. BOWEN,
Creditor.

Subscribed and sworn to before me this 4th day of May, A. D. 1905.

(Signed) L. D. BOYD,
(Notarial Seal) *Notary Public.*

My commission expires June 19, 1907.

6 Subscribed and resworn to before me this 23rd day of December, 1905.

(Signed) C. OLIVER HOLMES,
(Notarial Seal) *Notary Public.*

Com. expires Dec 2, 1908.

Attached to the foregoing proof was the original note, which said note was endorsed as follows: "Interest paid to maturity. Paid ninety & 45/100 dollars ($90.45) by balance of Account April 1st, 1904."

At Delphi, in said District, on the 4th day of May, A. D. 1905, came Abner T. Bowen, of the City of New York, in the County of New York and the State of New York, and made oath and says that Alfred McCoy the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of $5340.00; that the consideration of said debt is as follows:

Money loaned bankrupt to the amount of $5,000.00 evidenced by one promissory note for $5,000.00 executed on the 6th day of November, 1903, due four months after date, payable to the order of A. T. Bowen & Co, with interest at six per cent per annum from maturity, at the office of A. T. Bowen & Co, Bankers, 11 Wall Street, New York, said note falling due March 4", 1904, executed by A. McCoy & Co, Thomas J. McCoy and Alfred McCoy, that said promissory note was executed to and in favor of this deponent, who was at the date of said note, doing business in his individual capacity, under the firm name of A. T. Bowen & Co. at 11 Wall Street, in the City, County and State of New York aforesaid. Said original note is filed herewith and made a part hereto and marked Exhibit "A", and that no part of said debt has been paid, that there are no set-offs or counterclaims to the same, and that the deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

7

And affiant further avers that at the time the note herein was executed and up to the present time, it has been and is the law of the State of New York, under the rules of law as determined by the highest Judicial Tribunal of said State, that where a promissory note is executed by and in the name of a partnership, and for the sole benefit of such partnership, and in addition to the signature of the partnership, the separate members of such partnership join in the execution of such note by signing said note as individual makers thereof that the members of such partnership signing the note as aforesaid and severally bound, and each assume the liability of sole maker, because of the signing of his individual name

to said note and each one is bound to the same extent that he would be bound had the consideration of said note been for his sole benefit. Sum

(Signed) ABNER T. BOWEN,
Creditor.

Subscribed and sworn to before me this 4th day of May, A. D. 1905.

(Signed) L. D. BOYD,
(Notarial Seal.) *Notary Public.*

My commission expires June 19, 1907.

Subscribed and resworn to before me the undersigned Notary Public this 23rd day of December, A. D. 1905.

(Signed) C. OLIVER HOLMES,
(Notarial Seal.) *Notary Public.*

Com. expires Dec. 2, 1908.

Finding and Order.

The finding and order of this referee entered upon the hearing of said proof of claim and the motion to disallow and to expunge the same and the evidence thereunder submitted is as follows, towit: Find

At Hammond, said District, the 17th day of January, 1906.

The claims of Abner T. Bowen against the estate herein, of said bankrupt, upon two certain promissory notes in the sum of five thousand dollars each, coming now on for final determination, and this Referee having considered said claimant's proofs of debt, which are as follows:

And having considered the several motions heretofore filed by the trustee herein to disallow and expunge said claims, which motions are as follows:

And having heard the evidence submitted under said motions, and having heard the arguments respectively for and against said motions and having taken the allowance of said claims under advisement and now being advised in the premises, this referee finds for said trustee herein that said motions should be granted; that each of said claims is not provable herein as a primary claim against this estate, and that the same should be disallowed.

It is therefore ordered that said claims and each of them be, and the same hereby are disallowed as against the indivdual estate of said bankrupt, Alfred McCoy, subject only to such right as said claimant may have in said estate as a cred-

order itor of the estate of the firm of A. McCoy & Company, bankrupt, after the payment of the individual creditors of the estate of said Alfred McCoy, bankrupt.

JNO. O. BOWERS,
Referee in Bankruptcy.".

Said claimant Abner T. Bowen having within ten (10) days after the date of said order of disallowance, namely, on the 20th day of January, 1906, filed his petition in duplicate for review, together with his brief, and assignment of errors in duplicate with this referee, said question is hereby certified to the Honorable Albert B. Anderson, Judge of said Court, for his opinion thereon.

In Witness Whereof, I have hereunto set my hand this 31st day of January, A. D. 1906.

JNO. O. BOWERS,
Referee in Bankruptcy.

The written motions of the trustee praying the disallowance of the said claims were respectively based upon the following grounds:

9 First: That the allegations contained in the respective proofs are not true.

Second: That the consideration for each of said notes passed to the firm of A. McCoy & Company, and that the said Alfred McCoy in the signing of said notes, signed solely as a member of the firm of A. McCoy and Company.

Third: That said notes are the notes of the firm of A. McCoy and Company and no one else.

Fourth. That the members of a firm in their individual capacity cannot become sureties for themselves as members of a firm.

Fifth. That said claims are partnership debts and not provable against the estate of the members of the firm.

JNO. O. BOWERS,
Referee.

I, John O. Bowers, one of the referees in bankruptcy of said court, to whom said matter has been duly referred and before whom the same is now pending, do hereby certify that the foregoing copy of finding and order is a true copy of the order herein made by me as referee for a review of which the said claimant Abner T. Bowen has filed his petition, brief and assignment of errors as aforesaid.

That the foregoing copies of proofs of debt are true and complete copies of the original proofs of debt filed herein by said claimant for the allowance of the claims which were disallowed by said foregoing order. Certifi ques

That the transcript of evidence hereto attached is a true and complete copy of the evidence submitted under said proofs of debt and the motions made against the same which motions were based on the grounds hereinbefore set forth.

Feb'y. 28, 1906.

JNO. O. BOWERS,
Referee.

TRANSCRIPT OF EVIDENCE.

Pertaining to the Claim of Abner T. Bowen. Transc dence

C. O. Holmes, Reporter.

At Hammond, said District, the 23rd day of December, 1905.

Evidence submitted in support of the claims of Abner T. Bowen.

Present:

Hon. John O. Bowers, Referee in Bankruptcy, Presiding.

James H. Chapman, Esq, as trustee of the estate of Alfred McCoy; and also Simon P. Thompson and Frank Foltz, attorneys for said trustee.

Abner T. Bowen, and his attorneys, M. Winfield and L. D. Boyd, of the firm of Boyd and Julien

Counsel for claimant Bowen and counsel for trustee stipulate that the evidence to be introduced shall apply so far as same may be applicable, to the two proofs of debt filed by plaintiff herein against the estate of Alfred McCoy, bankrupt, upon notes executed in the name of A. McCoy, Alfred McCoy and Thomas J. McCoy, and that the two proofs of debt shall be treated as consolidated.

Claimant submitted the following written evidence.

Mr. Winfield: We now introduce these notes (Reads.)

"New York, Aug. 20th, 1903, No. 35851. Note of 1903.

Ninety days after date, for value received, I promise to pay to the order of A. T. Bowen & Co. — — — — — — $5,000. Five thousand — — — — — — — — — — — — — — — — Dollars at the office of A. T. Bowen & Co, Bankers, 11 Wall St. New

York, with interest at — — — — per cent per annum from — — — — — — — until paid.

Due — — — —

(Signed) A. McCoy & Co.
Alfred McCoy.
Thomas J. McCoy.

P. O. Address,
Rensselaer, Ind".

The second note is as follows.

New York, Nov. 6th, 1903. No. 36010.

ov. 6. Four months after date, for value received, we promise to pay to the order of A. T. Bowen & Co, $5,000.00
Five thousand — — — — — — — — — — — — — — — Dollars at the office of A. T. Bowen & Co, Bankers, #11 Wall St. New York, with interest at six per cent. per annum from maturity until paid. Due Mach 6/04.

11 A. McCoy & Co.
Alfred McCoy.
Thomas J. McCoy.

P. O. Address — — — — —.

The endorsement on the first note read "Interest paid to maturity. Paid ninety & 45/100 dollars ($90.45) by balance of account, April 1st, 1904".

of ABNER T. BOWEN, being first duly sworn on oath to testify the truth, the whole truth and nothing but the truth relating to said matter, testified as follows:

Direct Examination by M. Winfield, Esq.

Q. What is your name?
A. Abner T. Bowen.
Q. Where were you doing business during the year 1903 and since that time?
A. Well, I was engaged most of the time in New York, interested also in Delphi.
Q. You were in the year 1903 and since that time engaged in banking business in the City of New York?
A. Yes, sir.
Q. Under what name?
A. A. T. Bowen & Company.

Q. Where in New York City?

A. At No. 11 Wall Street.

Q. Were you acquainted with Alfred McCoy and Thomas J. McCoy?

A. Yes, sir.

Q. How long had you known them?

A. Oh, twenty five or thirty years I guess; I would not be positive. I knew Alfred McCoy. I didn't know Thomas McCoy so long.

Q. You may state what arrangement, if any, you made with them in 1896 or 1897 in reference to doing business with you in the City of New York?

Mr. Thompson: We object to that. Any arrangements before the notes were given would merge in the notes.

— — — — or borrowing money from you?

12 Mr. Thompson: We object because it is wholly immaterial, and because of the fact that their borrowing money is not disputed.

Any arrangements made prior to the year of the note are merged in the note.

Referee: I am inclined to think that the objection should be sustained, but the witness may answer.

Mr. Winfield: I should advise your honor of the nature of it. In 1896 or 1897, there were arrangements made between A. McCoy & Company and A. T. Bowen & Company of New York, whereby they might procure money from them upon loan, and at that time Mr. Bowen required of them collateral for loans that he might make to them; and they said to him that they would sign individually instead of giving collateral, as they had several thousand acres of land individually, and that proved satisfactory to Mr. Bowen, and from that time on up to 1903 they sent notes to New York when they would want money, and if signed in this way, and if satisfactory to Mr. Bowen and in a condition to loan the money, he would accept the note and advance the money upon the note and give them credit with the money in their account that was kept there with them. These are the facts that I think ought to come before this Court and if it comes up for review before the United States Court, it ought to be shown.

Referee. The evidence may be submitted, that is, the witness may answer and the admissability of the evidence may be considered later. (To the witness) You may answer.

A. I was at Rensselaer, I think, in '96 or '97 and talked

with Mr. Alfred McCoy. He had been borrowing money from us at times and when he said that they would want to continue occasionally, I said 'well, most banks are willing to put collateral when they borrow. I think you had ought to put up collateral also'.

He said that they would sign them individually and that they owned four thousand acres in their individual names, which in any event would be liable for the obligations of the bank on these notes. I said, well I guess that is satisfactory. We would loan money in thay way if the business would warrant.

From time to time they sent notes, and if we had money to spare and thought the business would warrant it, we would discount them.

Q. You may state if those two, these two notes of $5,000. each were sent to you at New York under that arrangement made with you in 1896?

Trustee: Well, we object,--

Mr. Winfield: I will change that question.

Q. Were any different arrangements made from that time on until after the giving of these two notes in controversy?

A. No, sir.

Q. You may state the circumstances of the giving of the first note, due August, 1903, how it came?

A. Well the note was sent to me in New York and they said if we could discount it they would like to have us do so and credit the proceeds to their account. We did so.

Q. When did you accept the note and make the loan for this, after it was received in New York?

A. Yes, sir.

Q. Had you any previous arrangements with them to make the loan?

A. No, sir.

Q. Where did you reside at that time?

A. In New York City.

Q. What were the circumstances of the receipt of the note of November, 1903, for $5,000?

A. They were similar. They sent the note down there and wanted us to place the proceeds to their credit. We decided to do so.

Q. When did you decide upon that?

A. After I received it.

Q. Had you any previous arrangements with reference to making that loan?

A. Any contract to loan it? No, sir.

Q. When did you decide to make the loan: after the note was received in New York?

A. Yes, sir.

Q. What notice did you give them that you would make the loan?

A. We notified them that we would take the notes and 14 place the amount to their credit.

Q. Upon what did you rely in accepting the note and making the loan?

Mr. Thompson: We object to that.

Mr. Winfield: I want to show the Court that he would not have accepted the note and made the loan upon the individual signature of A. McCoy & Company.

Referee: Well, the objection is taken under advisement.

A. Well, I relied more upon the individual responsibility of Alfred McCoy and Thomas McCoy than I did on the signature of A. McCoy & Company. Of course I took that all into consideration.

Q. Were you at that time acquainted with the common law of the State of New York in reference to the liability, individual liability of partners where they had signed a note individually in addition to the signing of the name of the firm?

A. I had had advice on that from lawyers.

Mr. Thompson: We move to strike out the statement of witness as being a mere statement of what he had heard.

Cross-Examination by Mr. Thompson.

Q. You say you never made any new arrangement since 1896?

A. About '97 was the last I had.

Q. When was the last investigation you made?

A. In '97 was the last conversation I had with them.

Q. You know nothing about the common law of the State of New York except what some lawyer told you?

A. I know of some decisions in the Courts. Have read some.

Q. You are not practicing law, are you?

A. No, sir.

Q. Was this first note given for an original loan or note?
A. Yes, sir.
Q. For an original loan?
A. Yes, sir.
Q. The second note was given for an original loan?
A. Yes, sir.
Q. Did you know that Alfred McCoy and Thomas J. McCoy were the sole members of A. McCoy & Company?
15 A. I think so.
Q. You were sure about it?
A. I believe that I had been informed to that effect.
Q. You decided in making the first loan simply from the note itself and the information that you had received?
A. Yes, sir.
Q. You didn't have any communication directly with them?
A. Not at that time.
Q. Neither one of them?
A. Not at that time.
Mr. Winfield: We will offer decisions of the State of New York in this,—
Mr. Thompson: We object to that,—
Referee: Mr. Bowen, when you stated that the notes were sent to you, what did you mean?
A. I received them by mail from the McCoys.
Referee: State, if you know, whether they were mailed from Rensselaer, Indiana?
A. I think they were; I think they were post-marked there. The heading of the letter was from there.
Mr. Thompson: Was it on the regular heading of the bank?
A. I think so.
Mr. Thompson: Signed A. McCoy & Company?
A. I think so.
Q. You gave A. McCoy & Company credit?
A. Yes, sir.
Q. Have you the letters?
A. No.
Mr. Winfield. Had you any knowledge of their, of these notes being sent or had there been any arrangements in reference to them prior to the time of receiving them in the envelope, in the letter, as you have stated, in New York?
A. No, sir.

Q. And you lived during this time in the City of New York? Testimo Abner Bowe

A. Yes, sir; I have lived there for thirteen years now.

Mr. Winfield: In the 170th New York page—

Mr. Thompson: We object to reading any of the decisions of New York on the ground—

Mr. Winfield: Well, but we offer in evidence, submit it (You will admit that the book referred to is published by the authority of the State of New York and contains the reports of the decisions of the Court of Appeals of the State of New York) from page 156 in volume 170 is the decision in the case of the estate of Henry Baldwin, deceased, showing the common law in the State of New York in cases of this kind, where the individual brothers of a firm in addition to the signature of the firm signed the note.

Mr. Thompson: We object to it on the ground that the decision of the Court of Appeals of the State of New York as evidence of the common law is not evidence in the United States Court; that the doctrine of State's Rights applies only to the legislature in making laws and not to the Supreme Court of the State. And I refer you to Sixteenth Peters, page one, for a ruling on that.

Referee: The opinion may be read. Opinion of Ap New

Mr. Winfield: (Reads.) The proceeding was brought to direct the sale of the real estate of Henry Baldwin, deceased, for the payment of his debts. The learned surrogate has found that in the year 1880 it was agreed between Henry Baldwin, the deceased, and one James Baldwin and one Sarah Weatherby that the said James Baldwin should operate a bank known as "James Baldwin & Co. Bank", he to furnish all the capital and to have all the benefits therefrom and neither said Weatherby nor said Henry Baldwin to have any of the profits of the business. But to give the bank credit and to secure the payment of any creditors it was to be carried on under the name of James Baldwin & Company and the names of James Baldwin and Henry Baldwin were printed on the letter-heads of the bank which were used in its business and distributed throughout the community. Mrs. Weatherby died in 1892, leaving a will of which James Baldwin and Lucius N. Manley were the executors. Subsequently the bank failed and afterwards Henry Baldwin died. His estate was insufficient to pay all the claims against it, his personal debts and the claims against him as an ostensible member of the firm

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of James Baldwin & Company. The decree of the surro-
17 gate directed that the proceeds of the sale of said Henry Baldwin's real estate should be first applied to the payment of his individual creditors and the surplus to the payment of the creditors of the firm of James Baldwin & Company. It also determined the amount and character of the several claims. The appellant is a firm creditor and he objects to the decree in two particulars:

First, in so far as it held that the claim of the administrator of Sabrina Warner was an individual debt of the deceased: Second, so far as it held that a deposit made in the bank by James Baldwin as executor of Mrs. Weatherby was a liability of the estate at all.

Mrs. Warner had been a depositor in the bank for some years, holding its certificates of deposit, bearing interest, signed James Baldwin & Company. In 1895 she had difficulty in collecting her interest, only part being paid, the bank being evidently in financial difficulty. She was asked for leniency and consented to surrender the certificates of deposit then held by her on receiving new ones signed not only by James Baldwin & Company, but by Henry Baldwin, the deceased. These were in the following form:

"Certificate of Deposit. James Baldwin & Co. Bankers. $1,000. no-100

"Addison, N. Y. June 20, 1895.

"Mrs. S. Warner has deposited in this bank one thousand dollars payable to the order of herself in current funds as specified below on return of this certificate properly endorsed 6 mos. after date with 4 per cent. interest, 12 mos. after date with 5 per cent. interest,—mos. after date with—per cent interest.

"No interest after time specified.

"No. 710.

(Signed) JAMES BALDWIN & Co.
"HENRY BALDWIN."

It is contended by the appellant that Henry Baldwin assumed no individual liability by subscribing his name to these certificates; that the instruments are not promissory notes, but merely certificates of deposit; that they acknowledge a receipt of the funds by the bank, not by Henry Baldwin
18 individually, and that therefore, Mrs. Warner's administrator should share only ratably with the other firm

creditors. If we assume that the instruments are mere certificates of deposit we think that does not relieve the estate of Henry Baldwin from liability as for his individual debt. While it may be that the obligation to repay the amount represented by the certificates does not proceed from any express promise in the instruments, but springs from the duty imposed by law, nevertheless the certificates are negotiable instruments upon which an action could be maintained. (Pardee v. Fish, 60 N. Y. 265; Miller v. Austen, 13 How. U. S. 218; Nat'l. Bank of Fort Edward v. Wash. Co. Nat. Bank, 5 Hun, 605. See Daniels on Negotiable Instruments, § 1698 et seq.) In the case in this Court Judge Miller said: "Even although a demand was necessary upon the bank before an action could be brought against it on the instrument, thus distinguishing the case from that of a promissory note, where the maker may be sued without any demand, I do not think that this fact takes away the negotiable character of the instrument under the decisions cited, and it must, therefore, be considered as possessing all the features of a negotiable promissory note".

Opinion of Court of Appeals.

The statement contained in one of the opinions in Hotchkiss v. Mosher (48 N. Y. 478), that such a certificate is a mere receipt, must be considered as overruled by the case from which I have quoted. If these instruments had been promissory notes, though in terms purporting to express only an obligation upon the part of James Baldwin & Company or his bank, still by signing his name thereto Henry Baldwin would have become liable as a surety. (Parks v. Brinkerhoff, 2 Hill, 663.) If there is no substantial difference between negotiable certificates of deposit of the character of those now before us and promissory notes, except as to the running of the Statute of Limitations, the same doctrine must prevail here and Henry Baldwin be deemed a surety. While it is true that he would have been liable as an ostensible member of the firm of James Baldwin & Company, the depositor had the right to obtain the additional security of his individual responsibility (Matter of Gray, 111 N. Y. 404), and the evidence shows that it was this which she insisted on having. The decrees of the courts below were, therefore, right in this particular.

19 We do not see any ground on which the allowance of the deposit of James Baldwin, as executor of Mrs. Weatherby, in the bank, as a claim against the estate of Henry Baldwin, can be sustained. There was no partnership in fact be-

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tween James Baldwin and Henry Baldwin, and this is in effect the finding of the surrogate. To give credit to James Baldwin, Henry Baldwin allowed himself to be held out as a partner; therefore, he became liable to all persons who might deal with the bank on the faith of his supposed connection therewith. But this deposit, if it may be properly so called, was made by James Baldwin, the executor, in his own bank; in other words, with himself. He knew perfectly the relations of Henry Baldwin to the business and that he was not a partner nor interested therein. The surrogate has found that James Baldwin made the deposit (in reality retained the money) in the belief that Henry Baldwin would thereby become responsible therefor to the estate of which James was the representative.

Granting that such was the belief of the parties, this could not create any liability on the part of Henry. The debt or default occasioned by the failure of the bank was the default of James, and under the Statute of Frauds, Henry could not be liable for it unless he had contracted to that effect in writing. The doctrine on which the claims on which the claims of other creditors were properly upheld is not that Henry was liable for the default of James, but that the credit was originally extended to both James and Henry, a doctrine which can have no application to this claim.

The judgment appealed from should be modified so as to strike out the provision establishing the claim of the estate of Mrs. Weatherby, and, as modified, affirmed, without costs to either party.

Parker, Ch. J. Gray, O'Brien, Bartlett, Haight and Werner, JJ. concur.

Judgment accordingly".

We also offer in evidence—(To Mr. Thompson) You will admit that this is the authorized reproduction of the decisions of the Court of Appeals of the State of New York?

Mr. Thompson: I suppose so.

20 Mr. Winfield: From Volume 111, page 404, decision of the case entitled In the Matter of the Judicial Settlement of the Estate of Charles B. Gray, Deceased.

Mr. Thompson: Same objection and same ruling.

Referee: Objection is taken under advisement; opinion may be read:

Mr. Winfield. (Reads.) "Appeal from order of the General Term of the Supreme Court in the second Judicial de-

partment, made December 14, 1886, reversing in part a decree of the surrogate of the County of Orange, upon settlement of the accounts of Lewis E. Carr, as administator of the estate of Charles B. Gray, deceased.

(Reported below, 42 Hun, 411)

Upon the accounting Sarah B. Lockwood, who held a joint and several note, executed by the decedent, C. G. Lockwood and herself, payable to the order of H. H. Farnum, presented the same as a claim against the estate. It appeared that the makers, Gray and Lockwood, composed the firm of Gray and Lockwood; that the note was given for a loan made by said Farnum for the benefit of the firm; that said Sarah B. Lockwood signed it for the benefit and accommodation of the other makes and was compelled to take it up; that Lockwood, the surviving member of the firm, was insolvent, and there were no firm assets. There were not sufficient assets of the estate to pay the individual and the firm creditors. Mrs. Lockwood claimed the right to share equally with the individual creditors in the distribution. This the surrogate refused, holding that the claim was a firm debt and so must be deferred until the individual claims were paid in full. The appeal was from this portion of the decree.

* * * * * * *

It is conceded that the right of Mrs. Lockwood to share in the distribution of the assets of the estate of Charles B. Gray, in the hands of his administrator, is governed by the rules by which courts of equity are guided in distributing the separate estate of an insolvent, as between his separate creditors and the creditors of a copartnership of which he was a member.

The general rule in such cases is that the separate cred-
21 itors are entitled to be first paid, on the ground that their debts were contracted on the credit of the separate estate, while partnership debts are contracted primarily on the credit of the joint estate. But as a partnership debt is regarded in equity as both joint and several, there is an apparent inconsistency in excluding in equity the right of the partnership creditor to share with the separate creditor, where, as in this case, there is no joint estate and the surviving partner is insolvent. But the doctrine stated is the settled law of this State, and is not open to question. The main debt of Mrs. Lockwood never in form, at least, was the copartnership debt of Gray and Lockwood.

In February, 1875, Gray and Lockwood, in their individual

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names, and not in the name of the firm executed, together with Mrs. Lockwood, their joint and several promissory note for $2,000. payable to one Farnum, in consideration of a loan for that amount made by the payee to Gray and Lockwood at that date. Mrs. Lockwood signed the note at the request of the other makers for their accommodation, and as between themselves she was a surety merely.

She was subsequently compelled to pay the note, which is the foundation of her principal claim against the estate. It is found that the money was procured for the use of the firm of Gray & Lockwood, and was used in the firm business, and that this was known to all the parties. Upon these facts is it a conclusion of law that the debt represented by the note was a firm debt, or that the claim of Mrs. Lockwood is to be ranked on the distribution of the separate estate of the decedent as a firm debt and excluded from participation until the concededly separate debts are paid? We are of opinion that no rule of marshaling assets requires such a determination. The payee of the note had a right to prescribe the security which he would accept for the loan. He chose to take the joint and several individual note of the parties, with the name of Mrs. Lockwood added. By the contract it was made the several debt of each of the makers, and we perceive no ground, in abstract justice, why Farnum, or his successor in interest, cannot have the benefit of the security according to its terms, and the right to prove the debt against the separate estate of the decedent, and share equally with the other
22 separate creditors in the distribution. The fact that he knew that the money was borrowed for the use of the firm makes, we think, no difference.

If he had required separate security by mortgage, or otherwise, on the individual property of one of the firm, there could be no doubt that it would be valid against the separate creditors of the individual partner, notwithstanding he knew for what purpose the money was borrowed. (Meech v. Allen, 17 N. Y. 300)

It is plain that Mrs. Lockwood has the same equity that Farnum would have had if he still owned the note and presented it as a claim against the estate of Gray. He did not lend the money on the credit of the firm, or on the firm obligation, but on the joint and several promise of the individuals who composed it, and of Mrs. Lockwood. We need not consider whether he could have proved it in bankruptcy as a

firm debt on showing the circumstances. This has not been done and there can be no question of election as between the joint and separate estate, as there is no joint estate. We think the authorities sustain the view above stated and show that the debt of Mrs. Lockwood for the money paid in discharge of her obligation on the note was provable and entitled her to share pro rata with the other separate creditors of the decedent in the distribution. (Wilder v. Keeler, 3 Paige, 167; Morris v. Morris 4 Grat. 293; Ex parte Rowlandson 3 P. Wms. 405; Ex parte Bond, 1 Atk, 98; Ex parte Honey, L. R. 7 Chi. App. 178; 2 Lindley on Part. 1095, 1232, 1245, note.) The conclusion we have reached on the main question makes it unnecessary to consider the other questions. It follows that the order should be affirmed and judgment absolute rendered for the respondent on the stipulation.

All concur.

Order affirmed and judgment accordingly.

(Witness excused).

THOMAS J. McCOY, being first duly sworn, testified as follows, to wit:

Direct Examination by Simon P. Thompson.

Q. Are you Thomas J. McCoy of the firm of A. McCoy & Company?

23 A. I am.

Q. I will ask you to state if you remember with reference to the note of August, 1903, that was given A. T. Bowen & Company?

A. I know about it.

Q. Where was that signed?

A. Rensselaer, Indiana.

Q. Who got the consideration for it?

A. A. McCoy and Company.

Q. Did you individually get any part of it?

A. I did not.

Q. Did your father, Alfred McCoy?

A. He did not.

Q. Who were the only members of that firm at that time?

A. Alfred McCoy and myself.

Q. Do you know what was done with the note when it was signed?
A. It was mailed to New York.
Q. At Rensselaer?
A. From Rensselaer.
Q. Did you see Alfred McCoy sign the note?
A. Well, I couldn't say as to that.
Q. Where did he sign it?
A. I can't recall.
Q. Did you say it was signed at Rensselaer?
A. I know that that note was signed at Rensselaer.
Q. Both of them?
A. Yes, sir.
(Witness examines notes which are handed to him by counsel). I signed the firm name myself.
Mr. Winfield: How did you come to sign the individual names of Alfred McCoy and Thomas J. McCoy?
Mr. Thompson: We object to that.
Mr. Winfield: I want to show what Mr. Bowen previously stated.
Referee: I suppose the instrument must be judged by itself. The objection is sustained but the witness may answer.
Mr. Winfield: I'll withdraw the last question. Was Mr. Bowen present at Rensselaer when that note was signed?
24 A. No, sir.
Q. Either of them?
A. He was not.
Q. Did you have any conversation with Mr. Bowen about loaning money?
A. I don't think I ever did. To my recollection I never did.
(Witness excused.)
Mr. Winfield: There's one question I forgot to ask?
Mr. Winfield. (To Mr. Bowen). Who composed the firm of A. T. Bowen & Company of New York?
A. I did.
Q. Had you any partner?
A. Not at that time.
Q. You were doing business under that name?
A. Yes, sir.
Q. Were you the sole owner of that note?
A. Yes, sir.

Q. And have been ever since?
A. Yes, sir.
(Witness excused.)

Parties admit that claimant Bowen did heretofore file his claim based on the notes herein introduced against the estate of A. McCoy & Company, bankrupt, and did receive one dividend thereon.

It is further admitted by the claimant and the trustee and by their attorneys that the estate of the firm of A. McCoy and Company will not pay the claims in full filed against said estate.

District of Indiana. }
United States of America. }

I, John O. Bowers, Referee in Bankruptcy, to whom the matters of A. McCoy & Company, bankrupt, No. 1769, of Alfred McCoy, bankrupt, No. 1770, and of Thomas J. McCoy, bankrupt, No. 1771, were referred and before whom the same are now pending, do hereby certify that the foregoing is a full, true and complete transcript of the evidence, exclusive of the verified formal proofs of debt, introduced in the said matter of Alfred McCoy, bankrupt, under and upon proofs of debt by Abner T. Bowen, based upon two certain promissory notes, copies of which appear in the foregoing transcript.

JNO. O. BOWERS,
Referee in Bankruptcy.

OPINION OF REFEREE.

The firm of A. McCoy & Company and each of the members thereof, namely, the said Alfred McCoy and one Thomas J. McCoy, were adjudged bankrupts under separate petitions filed by the creditors against said firm and each of the said members thereof respectively.

Claimant filed his claims against the firm estate based upon two promissory notes and also against the estate of Alfred McCoy and the estate of Thomas J. McCoy.

One of said notes is as follows:

Referee.

"New York, Nov. 6th, 1903, No. 36010.

Four months after date, for value received, we promise to pay to the order of A. T. Bowen & Co. $5.000.
Five thousand ..... Dollars,
at the office of A. T. Bowen & Co., Bankers, #11 Wall St, New York, with interest at six per cent. per annum from maturity until paid.

Due March 6/04.

A. McCoy & Co.
Alfred McCoy.
Thomas J. McCoy."

P. O. Address .....

The other note is substantially the same, except that the promissory words in the same are singular in form as follows: "I promise to pay". The said note was executed in the same manner as the one before set out.

In opposition to the allowance of this claim the trustee of the estate of Alfred McCoy files his motion to disallow
26 and expunge the claim herein upon the following grounds: (1) that the consideration for the execution of said notes passed to the firm of A. McCoy & Company, and that the said Alfred McCoy in signing said notes, signed solely as a member of the firm of A. McCoy & Company; (2). that said notes are the notes of the firm of A. McCoy & Company only; (3) that members of a firm in their individual capacity cannot become sureties for themselves as members of a firm; (4) that the claims are partnership debts and are therefore not provable against the estate of one of the members of the firm.

At the hearing of said motion testimony was submitted by claimant to show the place and manner of the execution of said notes and the persons to whom credit was extended; at which hearing the trustee and his attorney were present.

This extraneous evidence, if admissable, showed that the notes were signed at the bank of A. McCoy & Company at Rensselaer, Indiana, and forwarded by said firm by mail to Abner T. Bowen at #11 Wall Street, New York, without any previous agreement upon the part of said Bowen to make these particular loans and without any agreement upon the part of Alfred McCoy or Thomas J. McCoy to sign these notes in his individual capacity, except that some conversation or understanding took place between the said Bowen and said Alfred McCoy in the year 1896 or 1897 relative to the

signature by the individual members of the firm, to the effect that said notes then or thereabouts to be executed would be signed by Alfred McCoy and Thomas J. McCoy individually; that at the time of the mailing of said notes respectively by said A. McCoy & Company to the said Bowen, the said A. McCoy & Company stated that they would like to have the notes discounted and the proceeds placed to their credit on the books of said Bowen, who was then engaged in the banking business in the City of New York; that the acceptance of the notes and the making of the loans on the part of said Bowen took place in the City of New York; that when said Bowen decided to make said loan, he notified said A. McCoy & Company that he would take the notes and place the amount thereof less the discount to their credit; that the money so obtained was obtained for and used by the firm. Said Bowen stated that in the making of said loans, he relied upon the individual responsibility of Alfred McCoy. Opinion

27 Claimant seems to predicate the liability of Alfred McCoy (1), upon the proposition that he was surety for the firm of A. McCoy & Company; (2) that under the laws of the State of New York, obligations executed in the form and manner in which these notes were executed, are provable in insolvent or decedent's estates, against the estates of the individual members as well as against the estate of the firm.

At the outset of the investigation of the proposition involved, we are called upon to determine whether extraneous evidence is admissible for the purpose of showing the relation of the makers and the capacity in which they executed the notes. The notes do not in terms disclose the character or personnel of the maker A. McCoy and Company. The instruments bear the signature of Alfred McCoy as a maker. Is his estate, now in the hands of a trustee in bankruptcy, liable, by reason of said signature, for the payment of said notes or either of them? If no extraneous evidence be admissible and if also the referee or Court cannot take cognizance of the fact that A. McCoy & Company was a partnership composed of the said Alfred McCoy and Thomas J. McCoy, and that the same is now a bankrupt, then it would appear that said notes are to be considered prima facie the obligations of Alfred McCoy. On the other hand if extraneous evidence be admissible to show the relation of the parties, then we are called upon, in the light of such extrinsic evidence submitted, to determine whether there is an obligation upon the part of

referee. Alfred McCoy as an individual, separate and distinct from his obligation as a member of the firm of A. McCoy & Company, and if so, whether such obligation is provable against his estate as an individual debt on equality with the ordinary unsecured creditor of said bankrupt, and as a claim superior to the rights of the general creditors of the firm, to share in the assets of the individual estates after the payment of the individual debts.

The relation of the apparent makers to one another is not a part of the contract with the creditor, but is a collateral fact, and as such may be shown by extrinsic evidence.

Grafton vs. Kent, 4 N. H. 22; 17 A. M. Dec. 414; In re.
28 Weisenberg & Co. 12 A. B. Rep. 417; In re Warren Fed. Cas. No. 17, 191; Trowbridge vs. Cushman 24 Pick. (41 Mass. 310)

The evidence of an understanding had, or agreement made, several years prior to the time of the execution of these notes, to the effect that said Alfred McCoy would personally sign certain notes then about to be executed to said claimant, would appear to be irrelevant or immaterial here, even if evidence of such an understanding relative to these notes were admissible, the admissibility of which character of evidence we very much doubt.

Claimant filed his claim based upon these notes against the estate of A. McCoy & Company, bankrupt, and has received one dividend thereon.

We have remaining then the question of the character of the liability, if any, of Alfred McCoy by reason of the subscription of his individual name upon said notes. The subscription of the firm name bound him as a member of the firm. Such joint obligation is provable against the firm estate only. But a firm may be bound not only by its signature, that is the signature of the firm name, but by the signature of the names of each of the members of the firm, particularly, if the consideration is obtained and used by the firm for firm purposes.

Iddings v. Pierson, 100 Ind. 418; McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Agawana Bank v. Morris, 4 Cush. (58 Mass) 99.

The evidence in this case shows that the consideration for these notes was obtained and used by the firm for partnership purposes. If the name of the firm had been omitted, the facts otherwise remaining the same, the notes would have been firm obligations in point of fact and doubtless might

have been proved against the firm estate. It has been said Opinion
that if the promissory words of a note are singular, as, "I promise to pay", and if the note be signed by several persons, it is a several note; yet I apprehend that an exception is made in case that such note be signed by a firm in its firm name.

Weirick vs. Graves, 73 Ill. App. 266; Ex Parte Buckley 14 N. & W. 469; Doty vs. Bates, 11 Johns 543;

Clearly, such note in so far as the firm is concerned, is
29 a joint note. A firm or co-partnership in the State of Indiana, except for the purpose of proceedings in bankruptcy or insolvency, is not an entity and was not at the time of the execution of the notes in question.

What then was the legal effect of the act of Alfred McCoy in subscribing his name in addition to the name of the firm? Did he thereby add anything to his obligation as a member of the firm of A. McCoy & Company? If so, why? Claimant insists that he thereby became surety for the firm. What then is the nature of a surety contract?

Pothier says: The obligation of a surety is nothing else than a simple accessory to the obligation of the principal debtor".

Pothier on Obligations, 446. "It (suretyship) is an obligation accessorial to that of the principal debtor". Evans v. Keeland, 9 Ala. 42. "To the contract of suretyship it is essential that there be a principal or third party primarily liable; for there can be no accessory without a principal". Addison on Contracts, 994.

"If the promissor is himself interested in the subject-matter of the promise or the transaction to which it relates he will stand in the relation of a principal contracting party". Addison on Contracts, 995.

Moreover, a surety is vested with the right of contribution as between himself and his co-sureties, and with the right of exoneration as against the principal, together with the right to require a creditor to bring suit against a failing principal.

As a partner, Alfred McCoy became a joint principal, and as such became liable for the whole debt, and, barring proceedings in bankruptcy or insolvency, his estate would be liable for the satisfaction of such debt. What, then, was added to these obligations by the addition of the signature of Alfred McCoy? Can an individual be surety on an obligation in which he is principal? Can one be surety without the rights of a surety? Upon principle it would seem that these ques-

of referee. tions should be answered in the negative. Manifestly, the ordinary rights of a surety are absent here.

As against the obligee a surety is an original, unconditional obligor, and is bound with his principal as an original promisor. He is a debtor from the beginning and must see
30 that the debt is paid. Baylies, 4. So far as the obligee is concerned, the obligation of a surety ordinarily is identical with that of the principal. Suretyship is a question to be worked out between obligors. The consideration moving to the principal supports the entire obligation. It has been said that the undertaking of a surety who signs upon the face or at the end of a contract with the principal, although he adds the word "surety" to his own name, is an original, and not a collateral undertaking. It is not a promise to answer for the debt, default or miscarriage of another, but is an undertaking for a direct performance. He becomes a party to the contract and may be treated as principal by the creditor, although he is a surety merely as between himself and the other party with whom he jointly or severally undertakes". Perkins v. Goodman, et. al. 21 Barb. 218.

I think it follows that Alfred McCoy is not a surety on these notes. As the claim of claimant is based upon the theory of suretyship, perhaps it should be required to abide by its election, but it may be proper to enquire whether as between the obligors all are principals, not merely jointly as partners but severally or jointly, but not as partners. Did Alfred McCoy by signing his name to the note become a separate principal as between himself and Thomas J. McCoy, or between himself and the firm—himself and Thomas J. McCoy? Did he thereby add anything to his obligation as a partner principal, or create an obligation distinct and separate from his obligation as a partner?

In Fayetteville National Bank of Lexington v. Kenney's Assignee, 79 Ky. 133, it appears that notes were signed by a firm in the firm name, and also by two of the members of the firm (as in the case at bar.) The firm made an assignment for the benefit of creditors, and partner Kenney executed a deed of trust for the benefit of creditors. The bank proved its claim upon said notes against the firm estate and received a dividend of 31%. It also filed its claim, based on the same notes, against Kenney's trustee.

It was held that the debt was a firm debt only, and that the individual signatures of the partners added nothing to their

obligation as partners, and that it did not create a sev- Opinion
31 eral obligation provable against Kenney's trustee.

The Court said: "It is immaterial how the partner's name gets on the paper; if it is a partnership debt and the firm primarily liable as between it and the individual partners it is a firm liability, and if the creditor asserts his claim against the assets of the insolvent firm he will be estopped to say that the equity of the individual creditor is to be disregarded or that such equity never existed because the individual signing made the individual partner liable either as principal or surety. A court of equity, delighting in equality, will strive to prevent such a distribution instead of seeking a mode for obtaining it". The Kentucky statute concerning distribution in insolvency proceedings differs somewhat from the bankruptcy statute, but the principle as announced by the court apparently did not turn on the statute.

In re Blumer & Co. 13 Fed. Rep. 622, a member of a firm endorsed his guaranty on the back of a firm obligation after its original execution. In bankruptcy proceedings the original holder sought to prove the claim against the individual estate of the guarantor. It was held that the creditor obtained no additional obligation against the guaranteeing member.

A similar view was apparently entertained by the Court in re Warren, 2 Ware, 322, (Fed. Cas. No. 17,191.) The Court said:

"But where a partnership consists of two persons and they both sign a note or bill with their individual names, and not by the name of the firm, or one draws a bill and the other accepts it, if it be in fact for a joint or partnership obligation there would seem to be a strong reason for putting it, in the marshaling of securities, to the partnership account. But where two persons who are partners unite in drawing a bill or making a note, though they sign their several names, and not that of the firm, if it is in fact for partnership purposes, I am not aware that it has been decided that such a note or bill is not to be treated throughout as a partnership security.

The general language of elementary writers leads to the conclusion that such a note or bill is to be treated for all purposes as strictly a partnership security. The reason for
32 so doing, in the marshaling of assets and securities, is certainly very strong. The fruits of the contract having gone to increase the social fund, there is a natural equity in allowing the creditor a preference against that fund which is contract has contributed to augment. The principle is that

of referee. each class of creditors is thrown on that fund to which he has given credit and which he contributed to enrich.

In People v. Croton Aqueduct Board, 26, Abb. Pr. (N. Y.) 240, it appeared that a bid of a construction company or firm consisting of two members, had been signed in the firm name and in the names of each of the members individually. It was held to be the bid of the firm, not of the individuals.

I believe the opinions of the Courts are not uniform however, on this proposition. In Gilman v. Foot, 22 Iowa, 560, the Court seems to have taken a different view. So in Fowlkes v. Bowers, 11 Lea (Tenn) 144.

Counsel for claimant cite in re Farnum, Fed. case No. 4674, and other cases to the point that where a creditor has taken the precaution to obtain the obligation not only of the firm but of one or more of the members thereof, also such creditors should be allowed to pursue both the joint and several estates at the same time.

In most or all of these cases, so far as I have observed, the question has arisen upon the endorsement of firm obligations by one or more of the members thereof. The endorsement of a bill or note is a new contract by which the endorser conditionally undertakes that it shall be paid. Such contracts exist in favor of the endorsee or his assigns, and creates a several liability. The endorser may enlarge or restrict his liability. It has even been held that a joint maker may make himself liable as endorser, and remain liable as such after having been discharged as joint maker.

Oneida County Bank v. Lewis 51 N. Y. Suppl. 826.

An endorser is not liable at common law as surety. It would appear therefore that even if it be deemed the law that the individual estate of a member of a firm may be bound by such member's endorsement of firm paper, it would not neces-
33 sarily follow that the individual estate would be bound by the subscription of the names of the members upon the face of the instrument in addition to the firm signature.

Counsel for claimant contend that the notes are to be regarded as contracts executed in the State of New York. The notes having been made payable in New York, at the office of the payee, and having been sent to that place by the makers from Rensselaer, by mail, I suppose that state is to be considered the place of delivery and contract.

Phipps vs. Harding 17, C. C. A. 203; 30 L. R. A. 513.

Assuming then that the contract is to be deemed as having been made in the State of New York, how shall it be enforced?

Counsel for claimant do not submit any statute of the State of New York declaring the rule in such cases to be that such contract shall be deemed both firm and individual and that such individual debt may be proven against the individual estate even in insolvency proceedings, or in the settlement of decedents' estates. Two opinions of the Court of Appeals of that State are submitted, namely: the opinion in the matter of the estate of Gray, deceased, 111 New York, 404, and the opinion in the matter of the estate of Baldwin, deceased, 170 New York, 156. Opinion

In Swift vs. Tyson 41 U. S. (16 Pet. 1) the Court in interpreting the 34th section of the Judiciary Act of 1789, relative to the recognition by the Federal Courts of the law of the several states, says:

"In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves, laws. They are often reexamined, reversed and qualified by the courts themselves.

It never has been supposed by us that the section did apply, or was designed to apply to questions of a more general nature not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts, or other written instruments,
and especially to the questions of general commercial
34 law, where the state tribunals are called upon to perform
the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case".

The same doctrine was declared in Farmers' National Bank vs. Sutton Mfg. Co, 3 C. C. A. 1; 17 L. R. A. 595.

But even if this Court were bound in such cases by the decisions of the states in which such contract was executed it can hardly be fairly said that the decisions are in point.

In the case of Gray, deceased, although the consideration moved to the firm of Gray and Lockwood, the note, apparently in terms was a joint and several note, executed by the members in their individual names, and by Mrs. Lockwood. The Court says: "By the contract it was made the several debt of each of the makers".

The debt was not treated in any sense as a firm obligation.

In the case of Baldwin, deceased, the instrument containing

1 referee. the obligation sought to be proven against the estate of one Henry Baldwin, was signed in the name of James Baldwin & Company and Henry Baldwin. Henry Baldwin was an ostensible, not an actual member of the firm of James Baldwin & Company. The instrument was a renewal of a former obligation surrendered, apparently, on condition that the new one should be signed not only by James Baldwin & Company, but by Henry Baldwin also. The Court held that the claim was provable against the individual estate of Henry Baldwin, and should be paid along with other individual creditors prior to the payment of the creditors of the firm of James Baldwin & Company of which Henry Baldwin was an ostensible member only.

It is true the Court treated Henry Baldwin as a surety on the obligation, but he was surety in that case for the debt of another or others, for which he was liable only, if liable at all, upon the principle of estoppel. Apparently the holder of the obligation, a certificate of deposit, desired to obtain the express acknowledgment of the obligation upon the part of Henry Baldwin, probably thereby to avoid proof of liability by reason of connections, real or ostensible, with the firm.

35 There is yet another proposition to be considered. It is the rule of distribution in courts of bankruptcy. In re Nims, Fed. Cas. 10269, Judge Blatchford in delivering the opinion of the Court relative to the provisions of the statute of 1867, relative to distribution among separate and partnership creditors, said:

"The rule of distribution prescribed by this section is very distinct. It is arbitrary, like many other provisions of the bankruptcy statute, but it must be followed, and cannot be made to yield to any supposed equities in favor of any other rule of distribution.

In construing section 5f of the present act it has been held that joint and several notes given by partners for partnership liabilities, are partnership debts, notwithstanding that the partners are also individually or severally liable and that participation of such joint and several partnership creditors in the individual assets before the individual creditors are paid in full, should be denied. In re Mosier 112 Fed. Rep. 138; 7 A. B. R. 268.

If this be the correct interpretation of the present statute the question at bar is apparently easy of solution. Claimant being a firm creditor is limited in the first instance to the firm assets.

In some states obligations joint at common law, including contracts of a copartnership are by statute made joint and several, but I have not observed that such obligations permit proof in bankruptcy courts against the firm estate and the individual estates also. I am of the opinion that this debt should be treated throughout as a partnership debt and that the claim against the individual estate of Alfred McCoy should be denied.

JNO. O. BOWERS,
Referee.

36 And at the same time, said Referee filed in the office of the clerk of said court, the petition for review of the Referee's finding herein, and assignment of errors by said Abner T. Bowen, in the words following, to-wit: Petitio... view

To the Honorable A. B. Anderson, Judge of the District Court of the United States for the District of Indiana.

The petitioner, Abner T. Bowen, doing business in the City of New York under the name of A. T. Bowen & Company, and one of the creditors of said bankrupt, respectfully represents that on the 17th day of January, 1906, manifest error to the prejudice of complainant was made by the Referee in said matter in a finding and order disallowing and expunging the claim of said Abner T. Bowen against said bankrupt, as a several claim against this estate, and in ordering that the same be disallowed as against the indiyidual estate of said bankrupt, Alfred McCoy, subject only to such rights as said claimant may have in said estate as a creditor of the estate of the firm of A. McCoy & Company, bankrupt, after payment of the individual creditors of the estate of said Alfred McCoy, bankrupt; that such order was and is erroneous in that your petitioner, Abner T. Bowen of New York, held two promissory notes; one dated August 20, 1903, for the sum of $5,000.00 due 90 days after date and the second note for $5,000.00 dated Nov. 6th, 1903, and due 4 months after date, said notes being signed by A. McCoy & Company, Alfred McCoy and Thomas McCoy, and the Referee herein should have allowed said claim to have been proved against the individual estate of Alfred McCoy, bankrupt, and your petitioner makes the following assignment of error, towit:

Assignment of Error.

First: The evidence adduced before said Referee and set out in the record shows that said notes were executed in the City of New York, and were made payable in the City of New York, and were governed by the laws in force in the State of New York, and that said laws in the State of New York, as then in force, became a part of the contract; that under the law of the State of New York, as then in force, where a note or obligation for the payment of money is signed by the firm, in the firm name, and also signed by the individual mem-
37 bers of the firm, as surety for the firm, the same were provable both against the estate of the partnership and against the individual estate of the members of the firm, and the petitioner became and was entitled to share equally with the general creditors of the individual members, after deducting from the general amount the sum received by him from the estate of the partnership.

Second: Under the undisputed evidence transmitted to this Court, loans were made by this petitioner to the firm of A. McCoy & Company, upon the express representation, stipulation and agreement that the individual members owned a large amount of real estate not belonging to the firm, and under the stipulation and agreement that the individual members of the firm would sign said notes, making themselves individually liable and pledging said individual property, in addition to the pledging of the partnership property.

Third: Under the undisputed evidence in this case, it is proved that the petitioner made the several loans and took said obligations upon the express representation and condition that the individual members of the firm owned 4,000 acres of land in Jasper County, Indiana, and that the individual members, as an inducement to the petitioner to make said loan, expressly stipulated that in addition to the firm obligation, they would sign said notes individually, making themselves individually liable, in addition to the liability which might arise because of the firm obligation, and the Referee erred in holding that notwithstanding said facts, the individual signatures of the members of the firm to said obligation, added nothing thereto, and that your petitioner must stand upon the same rights as the general creditors of the firm, and was not allowed to participate in the distribution of the individual estate until after the individual creditors had been paid.

Fourth: The Referee erred in not allowing the petitioner's

claim against the estate of Alfred McCoy, and not entering an order that after deducting the amount received from the estate of the partnership, the balance of his claim should be paid equally with the other general creditors of the estate of Alfred McCoy.

Wherefore, your petitioner, Abner T. Bowen, prays that he may be decreed by the Court to have his claim against the
38 said bankrupt estate allowed for the full amount thereof, deducting only the amount received on his claim against the firm, and that he be restored to all things lost, by reason of the finding and order of the Referee in said matter.

ABNER T. BOYD
By L. D. BOYD and
M. WINFIELD,
His Attys.

The State of New York, }
County of New York. }

Before me, a Notary Public, in and for the County and State of New York, personally appeared Abner T. Bowen and upon oath says that the facts stated in the above and foregoing petition to review are true, as he verily believes, and further he deposes not.

ABNER T. BOWEN.

Subscribed and sworn to before me this 17th day of January, A. D. 1906.

JOHN J. CUNNEEN
(Seal.) *Notary Public, N. Y. Co.*

39 And afterwards, to-wit: on the 25th day of April, 1906, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings were had in the above entitled matter, to-wit:

The certificate of question by the Referee upon the claims of Abner T. Bowen, evidenced by two certain promissory notes, in the sum of $5,000.00 each, having been submitted for the consideration of the court, and the court being duly advised in the premises,

It is ordered that the decision and order of the Referee

thereon be and the same are hereby approved and affirmed, and that said claims be and they are hereby disallowed as against the individual estate of said bankrupt Alfred McCoy, subject only to such right as said claimant may have in said estate as a creditor of the estate of the firm of A. McCoy & Company, Bankrupt, after the payment of the individual creditors of the estate of said Alfred McCoy, bankrupt.

Here follows the opinion of the Court:

40 ANDERSON, District Judge:

The petitioner claims the right to pursue both the partnership and the individual estate; to share with the partnership creditors in the partnership property and with the individual creditors in the individual property.

This claim is based upon the fact that the notes are signed by A. McCoy & Company, the firm, and by Alfred McCoy and Thomas J. McCoy, the individual members of the firm.

The partnership received the entire consideration of these notes. It is therefore a partnership debt. Petitioner apparently wishes to occupy two different positions in the matter. In his first assignment of error he claims that he occupies the relation of surety for the firm. In the other assignments he claims that the individuals expressly stipulated that "in addition to the firm obligation, they would sign said notes individually, making themselves individually liable in addition to the liability which might arise because of the firm obligation." Under the reasoning of the referee, and the authorities cited by him, it does not seem to me that Alfred McCoy can be surety for the firm. The conclusion of the referee that the signing of the individual names added nothing to the liability of the individual members of the firm, and that the claim cannot be allowed against the individual estate, is further supported by a decision of Judge Drummond in the case of Gauss v. Schrader, 48 Fed. 816. In that case Dobschutz &

41 Abend, as partners, were liable on two promissory notes, endorsed by the firm. The firm was not able to pay the notes when they became due, and to secure an extension of time, Dobschutz and Abend individually made a contract with the payee in and by which their liability was admitted and the extension was granted in consideration of security being given by Dobschutz and Abend. The notes were not paid and the security was not given. Dobschutz and Abend were adjudged bankrupts as partners and as individuals, and the payee sought

to file the notes as a claim against the individual estate of Dobschutz. The argument was made there, as here, that by signing the contract Dobschutz made himself individually liable. The District Court held that the claim could not be filed against his individual estate, and this decision was affirmed by Judge Drummond, who, in the course of his opinion said:

"It will be seen that the agreement to convey the land was not for the purpose of payment, and if conveyed it would not have operated as such, but only as security for the payment of the indebtedness, so that the effect of the failure of the bankrupts was simply that they did not give the security which they agreed to give. The result was that the plaintiff thus gave time to the bankrupts, and the character of the debt remained unchanged. It was still a partnership debt due from the bankrupts to him. It becomes, therefore, a question of importance in this case, in view of the partnership and separate assets of the bankrupts and of the rights of their creditors, to determine whether it is equitable for the plaintiff, as against other individual creditors of Dobschutz to prove his claim against him. We have to look at the case upon the general principles of equity, and not as to the mere technical right of the plaintiff. It is true that this agreement between the parties was signed by Dobschutz and Abend individually, and there might be a technical liability against them for not giving the security which they had agreed to give; but, as has been already said, that did not change the character of the principal indebtedness, and did not make it an individual debt instead of a partnership debt. * * * Looking at
42 this case in its general scope and bearing, as it appears by the facts set forth in the declaration, and considering the various equities of the individual creditors of Dobschutz, and the character of the debt due to the plaintiff, I think that the decision of the District Court was right, and that the plaintiff ought not to be permitted to prove the claim set forth in the declaration against the individual estate of Dobschutz, and therefore that the demurrer to the declaration must be sustained."

The petitioner contends that by reason of his diligence in securing the individual names of the partners to the notes, under the circumstances testified to by him, he has the right to pursue the partnership estate and the individual estates at the same time, the only limitation being the full satisfaction of his debt.

Suppose it be conceded that petitioner's testimony as to his extending credit upon the faith of the individual property and the circumstances of the execution of the notes was properly admitted, and that it be given full effect, then the case stands as though there had been written into the notes an express stipulation that "in the event of the bankruptcy of the firm and the members composing it, the payee shall have the right to file this note against the partnership estate and the individual estate of the partners, and share in each until this note is fully paid." In effect this is what the petitioner claims.

The bankrupt law impairs the obligation of the debtor's contracts and discharges him from all of them. The bankrupt court steps in and takes possession of the property of failing debtors, notifies creditors to establish their debts, apportions the debtors' property among his creditors, and gives the debtor his discharge. In case of a partnership the act
43 specifically provides how the partnership and individual property shall be distributed:

Sec. 5, f: "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

If petitioner is right in his contention here, he, being one creditor only, can make an agreement with his debtor that in the event of bankruptcy another rule of distribution shall be effective. It may be conceded that a failing debtor may make a contract with all of his creditors to distribute the debtor's estate in a different way from that provided in the bankrupt law, but how can it be contended that one creditor may make such a contract with the debtor to the prejudice of other creditors, when such other creditors are not parties to the contract and know nothing about it?

Petitioner claims that his notes are New York contracts, and that he contracted with reference to that law, etc. All, the creditors of the firm and of the individuals composing the firm must be held to have contracted with a view to the bankrupt law and of its provisions relating to the distribution of

the debtor's property in the event of bankruptcy, and surely it cannot be held that one creditor, even by the exercise of "superior diligence" can make a contract with the debtor, the effect of which is to change the rule of distribution in the event of insolvency and give him an advantage
44 over other creditors of the class to which he claims to belong. Yet this is just what the petitioner asks. His debt is a partnership debt; he has so declared, and he has filed it against the partnership estate and has already received thirty per cent of it from that estate. One thing is clear; he is a partnership creditor, and as such, under the plain letter of the law, he cannot resort to the individual estate until individual creditors are first paid—so reads the law—but he says the debtor agreed that he should be an individual creditor also, and as such should have the right to resort, notwithstanding the bankrupt law, and notwithstanding it will prejudice the legal rights of the individual creditors, and notwithstanding they knew nothing of and never assented to such an agreement,—to share equally with individual creditors for the payment of this debt. To state such a proposition is to answer it.

As between themselves the debtor and petitioner can by contract agree that a debt which is a partnership debt shall be treated as an individual debt, but surely such agreement can not affect the rights of other individual creditors under the bankrupt law.

The finding and decision of the referee are affirmed.

45 And afterwards, to-wit: on the 25th day of April, 1906, aforesaid, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now Abner T. Bowen, by M. Winfield Esq., his solicitor, and files his petition for appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the finding and judgment of the court of this date disallowing his claims herein, and at the same time files his assignment of errors. And said appeal is now allowed by the court upon the filing of a bond by said petitioner in the penalty of $500.00 with sufficient sureties thereon, to be approved by the court.

And said petition for appeal and assignment of errors is in the words following, to-wit:

The above named Abner T. Bowen considering himself aggrieved by the judgment made and entered on the 25th day of April, 1906, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

L. D. Boyd &
M. Winfield,
Attorneys for Abner T. Bowen, Claimant.

46 ASSIGNMENT OF ERRORS

By Abner T. Bowen, a Creditor, to Judgment Disallowing Claim.

The District Court of the United States

For the District of Indiana.

In the Matter of Abner T. Bowen, *vs.* Alfred McCoy.	In Bankruptcy. Assignment of Error on Appeal.

And now, on the 25th day of April, 1906, came the said Abner T. Bowen, a creditor of the above named defendant, Alfred McCoy, by L. D. Boyd and M. Winfield, his solicitors, and says that the judgment and decree, in said cause, is erroneous and against the just rights of said creditor of said defendant, for the following reasons:

First: This Court erred in not allowing petitioner's claim and in not entering that the order and judgment be allowed as an individual claim against the estate of Alfred McCoy.

Second: This Court erred in affirming the order of the Referee refusing to allow the claim, and refusing to allow the claim to be allowed as an individual claim against the estate of Alfred McCoy, and refusing to adjudge that he be entitled to share with the individual creditors in the estate of Alfred McCoy.

Third: This Court erred in refusing to consider the evi-

dence in the record showing the circumstances under which the notes were executed, tending to show that the said Alfred McCoy intended to sign the notes as surety for the firm, and that the claimant, Abner T. Bowen, relied thereon, and because thereof waived collateral.

Fourth: Because the evidence shows that the claim of said creditor, of said above named defendant, was a provable debt against the estate of the bankrupt, Alfred McCoy, and the claimant, Abner T. Bowen, is entitled to share equally with the individual creditors of said Alfred McCoy.

47 Fifth: Because the evidence shows that the claim of said creditor, of said above named defendant, should have been allowed as a valid debt against the estate of the bankrupt, Alfred McCoy, and the claimant, Abner T. Bowen, is entitled to share equally with the individual creditors of said Alfred McCoy.

Sixth: Because the evidence shows that the judgment and decree should have ben in favor of this creditor of the said above named defendant, Alfred McCoy, and against the trustee of the above named defendant, adjudging and decreeing that the said Abner T. Bowen share equally with the individual creditors of the said Alfred McCoy.

Seventh: The evidence adduced before the Referee and set out in the record shows, that said notes were executed in the City of New York, and were made payable in the City of New York, and were governed by the laws in force in the State of New York, and that said laws in the State of New York, as then in force, became a part of the contract; that under the law of the State of New York, as then in force, where a note, or obligation, for the payment of money is signed by the firm, in the firm name, and also signed by the individual members of the firm, as surety for the firm, the same were provable both against the estate of the partnership and against the individual estate of the members of the firm, and the petitioner became and was entitled to share equally with the general creditors of the individual members, after deducting from the general amount the sum received by him from the estate of the partnership.

Eighth: Under the undisputed evidence transmitted to the United States District Court, loans were made by this petitioner to the firm of A. McCoy & Company, upon the express representation, stipulation and agreement that the individual

members owned a large amount of real estate not belonging to the firm, and under the stipulation and agreement that the individual members of the firm would sign said notes, making themselves individually liable and pledging said individual property, in addition to the pledging of the partnership property.

48 Ninth: Under the undisputed evidence in this case, it is proved that the petitioner made the several loans and took said obligations upon the express representation and condition that the individual members of the firm owned 4,000 acres of land in Jasper County, Indiana, and that the individual members, as an inducement to the petitioner to make said loan, expressly stipulated, that in addition to the firm obligation, they would sign said notes individually, making themselves individually liable, in addition to the liability which might arise because of the firm obligation, and the Court erred in holding that notwithstanding said facts, the individual signatures of the members of the firm, to said obligation, added nothing thereto, and that your petitioner must stand upon the same rights as the general creditors of the firm, and was not allowed to participate in the distribution of the individual estate until after the individual creditors had been paid.

Tenth: This Court erred in not allowing the petitioner's claim against the estate of Alfred McCoy and not entering an order that after deducting the amount received from the estate of the partnership the balance of his claim should be paid equally with the other general creditors of the estate of Alfred McCoy.

Wherefore, the said creditor, Abner T. Bowen, of the above named defendant, prays that said judgment and decree be reversed, and that the said Court may be directed to enter a decree and judgment allowing said claim of said creditor, Abner T. Bowen, as a provable debt against the estate of Alfred McCoy, and that he share equally with the individual creditors of the said Alfred McCoy, in accordance with the prayer of the bill, and for all other proper relief.

L. D. Boyd &
M. Winfield,
Solicitors for said creditor, Abner T. Bowen.

49 And afterwards, to-wit: on the 25th day of April, 1906, aforesaid, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled matter were had, to-wit: Bond on filed A 1906.

Comes now Abner T. Bowen by M. Winfield, Esq., his solicitor, and files his bond on appeal herein, which is now approved by the court.

And said bond is in the words following, to-wit:

We, Abner T. Bowen and John D. Wilson are bound unto the Trustee in bankruptcy of the estate of Alfred McCoy, in the sum of five hundred dollars ($500.00) which we jointly and severally promise to pay, without relief from valuation of appraisement laws.

The conditions of the above bond are, that, whereas, the said Abner T. Bowen has this day appealed from the order, judgment and decree entered in the above cause, by the United States District Court for Indiana, to the United States Circuit Court of Appeals for the Seventh Circuit,

Now, if the said Abner T. Bowen shall faithfully prosecute said appeal and pay all costs and damages that might accrue by reason of said appeal, then such bond shall be void, otherwise to remain in full force and effect.

Witness our hands this 20th day of April, A. D. 1906.

ABNER T. BOWEN (Seal.)
JOHN D. WILSON (Seal.)

State of Indiana, }
Carroll County, } ss:

John D. Wilson first being duly sworn on his oath says that he is the person who executes, as surety, the above and foregoing bond, wherein Abner T. Bowen is principal and he says that he worth over and above all his liabilities of every kind the sum of $2000.00. And further affiant saith not.

JOHN D. WILSON

Subscribed and sworn to before me this 24th day of April, 1906.

L. D. BOYD,
Notary Public.

(Seal.)

My Commission expires June 19, 1907.

Approved this 25th day of April, 1906.

ALBERT B. ANDERSON,
Judge.

e of clerk.

50 United States of America, District of Indiana. } ss:

I, Noble C. Butler, clerk of the district court of the United States within and for said district, do hereby certify that the above and foregoing are full and true copies of the certificate of question by the Referee, the petition for review, the decree of the court, the opinion of the court and all papers and procedings relating to the appeal of Abner T. Bowen to the United States Court of Appeals for the Seventh Circuit from the decree of this court, all in the matter of Alfred McCoy, bankrupt, as fully as the same appear upon the files and records now in my office.

Witness my hand and the seal of said court, at Indianapolis in said district, this 5th day of May, A. D. 1906.

NOBLE C. BUTLER,
Clerk.

(Seal)

51 CHANCERY. Citation.

United States of America. }

To James H. Chapman, Trustee in bankruptcy of Alfred McCoy Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago thirty days after the date hereof, pursuant to an appeal which has been allowed by the District Court of the United States for the District of Indiana, from its final decree in the matter of the disallowance of the claim of Abner T. Bowen, in which Abner T. Bowen is Appellant, and you are Appellee, to show cause, if any there be, why the decree rendered against the said Appellant as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness The Hon. Albert B. Anderson, Judge of the District Court of the United States for the District of Indiana, this 25 day of April, in the year of our Lord, one thousand nine hundred and six.

ALBERT B. ANDERSON,
(Seal) *Judge.*

I acknowledge service of the within citation and enter my appearance to said appeal, waiving the service thereof. Dated April 27th, 1906.

JAMES H. CHAPMAN
Trustee in bankruptcy of Alfred McCoy.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 45, inclusive, contain a true copy of the printed record filed in this court on June 16, 1906, which was indexed, supervised and distributed by me in accordance with the rules of this court and upon which the cause was heard and determined by the United States Circuit Court of Appeals for the Seventh Circuit, in the case of In the Matter of Alfred McCoy, Bankrupt, Abner T. Bowen, *vs.* James H. Chapman, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt, No. 1282, October Term, 1906, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this seventh day of December A. D. 1906.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms in the City of Chicago in said Seventh Circuit, on the third day of October, 1906, of the October Term in the year of our Lord one thousand nine hundred and five and of our Independence the one hundred and thirtieth.

And afterwards, to-wit: On the nineteenth day of May, 1906, in the October term last aforesaid, came the appellant by his counsel Mr. L. D. Boyd and Mr. M. Winfield, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1905.

1282.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of Alfred McCoy, Appellee.

The Clerk will enter *my* appearance as counsel for the appellant.
L. D. BOYD.
M. WINFIELD.

Endorsed: Filed May 19, 1906. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the thirty-first day of May, 1906, in the October term last aforesaid, came the appellee, by his counsel Mr. Frank Foltz, and filed in the office of the clerk of this court his appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1905.

No. 1282.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,
vs.
JAMES H. CHAPMAN, Trustee, Appellee.

The Clerk will enter my appearance as counsel for the Appellee.
FRANK FOLTZ.

Endorsed: Filed May 31, 1906. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the thirty-first day of May, 1906, in the October term last aforesaid, came the Appellee by his counsel Mr. Simon P. Thompson, and filed in the office of the clerk of this court his appearance which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1905.

No. 1282.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,
vs.
JAMES H. CHAPMAN, Trustee, Appellee.

The Clerk will enter my appearance as Counsel for the Appellee.
SIMON P. THOMPSON.

Endorsed: Filed May 31, 1906. Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held at the United States Court Rooms in the City of Chicago in said Seventh Circuit, on the second day of October, 1906, of the October Term in the year of our Lord one thousand nine hundred and six and of our Independence the one hundred and thirty-first.

And afterwards, to-wit: On the second day of October, 1906, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *October* 2, 1906.

Present: Hon. Peter S. Grosscup, Circuit Judge presiding. Hon. Francis E. Baker, Circuit Judge. Hon. William H. Seaman, Circuit Judge. Edward M. Holloway, Clerk. Luman T. Hoy, Marshal.

1282.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN
vs.
JAMES H. CHAPMAN, Trustee.

Appeal from the District Court of the United States for the District of Indiana.

It is ordered by the court that this cause be, and the same is set down for hearing on October 17, 1906.

And afterwards, to-wit: On the seventeenth day of October, 1906, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, *October* 17, 1906.

Court met pursuant to adjournment and was opened by proclamation of Crier.

Present: Hon. Peter S. Grosscup, Circuit Judge presiding. Hon. Francis E. Baker, Circuit Judge. Hon. William H. Seaman, Circuit Judge. Edward M. Holloway, Clerk. Luman T. Hoy, Marshal.

1282.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appeal from the District Court of the United States for the District of Indiana.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. M. Winfield, counsel for appellant, and by Mr. S. P. Thompson, counsel for appel-ee, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the eighth day of November, 1906, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1282, October Term, October Session, A. D. 1906.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appeal from the District Court of the United States for the District of Indiana.

Before Grosscup, Baker and Seaman, Circuit Judges.

The appeal is from an order disallowing the claim of appellant against the individual estate of Alfred McCoy, bankrupt, "subject only to such right as appellant might have in said estate as a creditor of the estate of A. McCoy & Co., bankrupt, after the payment of the individual creditors of the estate of Alfred McCoy, bankrupt."

The facts are stated in the opinion.

GROSSCUP, *Circuit Judge,* delivered the opinion:

The firm of A. McCoy & Co., was, at the time of the adjudication of bankruptcy, a banking copartnership at Rensselaer, Indiana—the partners being Alfred McCoy and Thomas McCoy, likewise bankrupts; both the firm and the individuals having been adjudged bankrupts July 11th, 1904.

The appellant was, at the time of the transaction in question, a banker in New York City, doing business under the name of A. T. Bowen & Co. August 20th, 1903, there was borrowed from appellant, upon ninety day's time, the sum of five thousand dollars, and on November 6th, 1903, the further sum of five thousand dollars, for which two promissory notes were given, signed by the firm of A. McCoy & Co., and by the individual names, Alfred McCoy, and Thomas McCoy; the proceeds of the transaction going into the copartnership business. Upon the firm becoming bankrupt, and the individual partners becoming bankrupt also, these notes were presented and allowed as claims against the firm, and payments thereon have been made to the extent of thirty per cent. The claim presented against the estate of Alfred McCoy, and disallowed, is predicated on these notes to the extent that they remain unpaid.

In addition to the presumption arising on the face of the notes, with the signatures thereto, the record shows that at the time the money was borrowed and the notes executed, appellant said to Alfred McCoy, who negotiated the loan, that he (appellant) "thought some

collateral ought to be put up"; whereupon McCoy said that the partners "individually owned four thousand acres of land, and that they would sign the notes individually."

At common law, the notes under the circumstances are not only the obligation of the firm, but also of the individuals; and this is the law in Indiana. Winslow *vs.* Wallec, 116 Ind. 317.

"There seems to be no dispute" says Mitchell J. in Winslow *vs.* Wallace, *Supra,* "as indeed there could not well be, upon the proposition that a creditor who holds a note of which a firm are the makers, and one or more members thereof endorsers, has in his hands a valid joint obligation against the firm, and at the same time a distinct, several and separate obligation against those who have signed as endorsers. This result flows from the fact that the contract of an endorser is entirely independent of and distinct from that of the maker, each contract being in itself, when the endorsement is in regular course, conclusive in its legal import. The creditor holding a note so made and endorsed, may, therefore, pursue his remedy against the partners as makers, and he may also proceed against those individually liable, as endorsers. When the property of the firm, or the individual estates of the members bound as endorsers, are being judicially administered, the creditor is entitled to participate with the partnership creditors in the joint estate, and he may at the same time avail himself of any appropriate remedy he would otherwise have against the endorsers or their respective estates. He may receive dividends from the joint estate as a partnership creditor, and from the separate estate of the partners liable on their contract of endorsement as an individual creditor."

In re Thomas *et al.,* 8th Bissell, 139—the case of a note signed by the partners individually for a loan, the proceeds of which went to the copartnership—it is said:

"There is a class of cases in which it has been held that where a creditor holds notes signed by a firm, and signed or indorsed also by an individual member of the firm, he may prove against both estates, and receive dividends from both. *In re* Farnum (Case No. 4,674); Mead *vs.* National Bank of Fayetteville, (*Id.* 9366); Emery *vs.* Canal National Bank (*Id.* 4,446). These cases establish a rule opposed to the old rule on the subject in England, and the principle thus settled seems to reach out to the question involved in the case at bar. The scope of these decisions is, that when an individual member of a firm, as such, becomes surety upon or indorses an obligation of the firm, he thereby gives what is in the nature of security upon his separate estate to the firm creditor; and, by reason of the individual liability superadded to the joint obligation, he places the firm creditor in a position where he can go against the individual as well as the joint estate. Thus it results, that without the indorsement or individual signature of one of the firm, the firm creditor would have no right to claim against the individual assets until individual creditors had been first satisfied. But holding the individual indorsement or signature, the firm creditor may, in the first instance,

prove against the separate as well as the joint estate. Now, such separate liability would seem to be, at least, in the nature of security though differing radically, it is true, in character and form from that of a mortgage, and yet double proof, by the firm creditor in such case, may be made without any abatement of advantage which his diligence has secured."

Indeed these principles are not seriously controverted—the learned district judge predicating his opinion upon a supposed modification of this rule introduced by the Bankruptcy Act. That modification, if there be any, is contained in Section five sub. f., which reads as follows:

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

This provision was not intended, as we look at it, to modify in any respect, the pre-existing law. The section is, indeed, only a reenactment of pre-existing law. The claim disallowed, was not a claim for the payment of a partnership debt out of the individual estate. Had it been, the disallowance would have been proper; for both under the section of the statute, and under the pre-existing law, any surplus remaining after the payment of individual debts would have been added to the partnership assets, and thereby have become available to the payment of applicant's debt. The claim disallowed, was a claim for McCoy's individual debt—as much so as if McCoy had individually, on a separate piece of paper, obligated himself for this debt. And because it is his individual debt it is provable under the section cited, as well as under the general law, against his individual estate. True, the proceeds of the loan having gone into the partnership estate, it may be that individual creditors could insist, that in the marshaling of assets, the partnership estate should be exhausted before payment is made by the individual estate. That, however, is a question we do not decide, for the appellant only seeks to prove his claim against the individual estate, to the extent that it is unpaid by the partnership estate.

The opinion of the district court rests chiefly upon the case of Gauss *vs.* Schrader, 48 ed. Rep. 816, in which two men, indebted as partners on two promissory notes past due, entered into a written contract, in consideration of an extension of time, to convey to the creditor certain property, not a part of the partnership assets, as additional security. Upon the creditor seeking to prove his claim, arising out of this executory promise, against the individual estate of one of the partners, the court well said that the character of the

principal indebtedness was not thereby changed—that the partnership debt was not thereby made an individual debt.

In England the old rule was, that in administering the bankrupt laws of that country, double proof against the partnership estate and the individual estate of the partners was not allowed. But this rule has not been followed in this country, Emery *vs.* Canal National Bank, No. 4446, Federal cases, Vol. 8; Bump's Bankruptcy, (5th Ed.) p. 198; *In re* Bradley, 3 Federal Cases, 1772; *In re* Farnum case No. 8674, Vol. 8, Federal Cases; Mead *vs.* National Bank of La Fayette, 6 Blatchford, 18; *In re* Bigelow, 3 Benedict, 146; and there is nothing in the bankruptcy act showing that this English rule was intended to be embodied in our act. Indeed, it is doubtful if the old rule is now in force in England.

The order appealed from must be reversed, with instructions to the court below to allow the claim as a debt against the individual estate of Alfred McCoy, to be paid therefrom ratably with the other creditors of that estate, to the extent that such debt is not paid in the administration of the estate of the firm of McCoy & Company.

And afterwards, on the same day, to-wit: On the eighth day of November, 1906, in the October term last aforesaid, the following proceedings were had and entered of record, to-wit:

THURSDAY, *November* 8, 1906.

Court met pursuant to adjournment and was opened by proclamation of Crier.

Present: Hon. Peter S. Grosscup, Circuit Judge presiding. Hon. Francis E. Baker, Circuit Judge. Hon. William H. Seaman, Circuit Judge. Edward M. Holloway, Clerk. Luman T. Hoy, Marshal.

1283.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appeal from the District Court of the United States for the District of Indiana.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Indiana, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this court that the order or decree of the said district court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said

district court with instructions to allow the claim as a debt against the individual estate of Alfred McCoy to be paid therefrom ratably with other creditors of the state, to the extent that such debt is not paid in the administration of the estate of the firm of McCoy & Company.

And afterwards, to-wit: On the thirtieth day of November, 1906, in the October term last aforesaid, came the appellee, by his counsel Mr. Simon P. Thompson and Mr. Frank Foltz, and filed in the office of the clerk of this court his petition for appeal to the Supreme Court of the United States and his assignment of errors, which petition for appeal and assignment of errors are in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1282, October Term, October Session, A. D. 1906.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appeal from the District Court of the United States for the District of Indiana.

Before Grosscup, Baker and Seaman, Circuit Judges.

Writ of Error for an appeal of this cause to the Supreme Court of the United States on behalf of appellee James H. Chapman, Trustee in Bankruptcy of the estate of Alfred McCoy, Bankrupt.

To the Honorable Peter S. Grosscup, Francis E. Baker, and William H. Seaman, Circuit Judges:

The above named defendant or appellee, James H. Chapman as Trustee in Bankruptcy of the estate of Alfred McCoy, Bankrupt in the above entitled cause, conceiving himself aggrieved by the judgment, order and decree made and entered by the above named court in the above entitled cause, under date of November 8, 1906, wherein and whereby, among other things, it was ordered, adjudged and decreed that the order in this cause rendered by the Honorable District Judge should be reversed, with instructions to the court below to allow the claim of the appellant Abner T. Bowen based upon the two notes described as follows:—

No. 35851.

"NEW YORK, *Aug. 20th,* 1903.

Ninety days after date, for value received, I promise to pay to the order of A. T. Bowen & Co. $5,000.00 Five Thousand Dollars, at the office of A. T. Bowen & Co. Bankers, 11 Wall St. New York, with interest at — per cent. per annum from — until paid.

Due —.

A. McCOY & CO.
ALFRED McCOY.
THOMAS J. McCOY."

The endorsement on the above note reads:

"Interest paid to maturity. Paid Ninety & 45/100 dollars ($90.45) by balance of Account, April 1st, 1904."

No. 36010.

NEW YORK, *Nov. 6th,* 1903.

Four months after date, for value received, we promise to pay to the order of A. T. Bowen & Co., $5,000.00 Five Thousand Dollars at the office of A. T. Bowen & Co. Bankers, #11 Wall St. New York, with interest at six per cent. per annum from maturity until paid.

Due March 6/'04.

A. McCOY & CO.
ALFRED McCOY.
THOMAS J. McCOY."

P. O. Address.

as a debt against the individual estate of Alfred McCoy, to be paid therefrom ratably with the other creditors of that estate to the extent that such debt is not paid in the administration of the estate of the firm of A. McCoy & Company, do hereby appeal to the Supreme Court of the United States from said order, judgment and decree, for the reasons set forth in the assignment of errors, which is filed herewith; that the amount in controversy exceed the sum of $2,000.00 and the question involved is one which might have been taken on appeal or writ of error from the Supreme Court of the State of Indiana to the Supreme Court of the United States; that it is the opinion of this trustee that the determination of the questions involved in the allowance of said claim as allowed by the finding of this court and as rejected by the Honorable Albert B. Anderson, District Judge, is essential to the uniform construction of this act throughout the United States.

I now pray that this my petition for said appeal may be allowed, and that the transcript of the record, proceedings and all papers upon which said order, judgment and decree was based and as now on file

in this cause, duly authenticated, may be sent to the Supreme Court of the United States as in such cases made and provided.

Your petitioner further asks to be allowed to perfect this appeal without filing a bond as is authorized under the present bankrupt law, as this appeal is taken by the undersigned as such trustee.

Wherefore, I ask that this my petition be granted and for all other relief.

Dated this 22nd day of November, 1906.

JAMES H. CHAPMAN,
Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

SIMON P. THOMPSON,
FRANK FOLTZ,
Attorneys for Trustee.

Endorsed: Filed Nov. 30, 1906. Edward M. Holloway, Clerk.

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1282, October Term, October Session, A. D. 1906.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appeal from the District Court of the United States for the District of Indiana.

Before Grosscup, Baker and Seaman, Circuit Judges.

Assignment of Errors.

By the Appellee, James H. Chapman, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

To the Honorable Peter S. Grosscup, Francis E. Baker, and William H. Seaman, Circuit Judges:

And now on the 22nd day of November, 1906 came the said James H. Chapman, as Trustee in Bankruptcy of the estate of Alfred McCoy, Bankrupt, the defendant in the above entitled cause by Simon P. Thompson and Frank Foltz, his solicitors and files the following assignment of errors upon which he will rely.

A. 1.

That the United States Circuit Court of Appeals for the Seventh Circuit erred in rendering judgment against this defendant in said

cause upon the pleadings in said cause, the evidence and the record and that said judgment is contrary to the law and the facts as stated in the pleadings and record in said cause.

B. 2.

That said Court erred in ordering that the order appealed from must be reversed with instructions to the court below to allow the claim as a debt against the individual estate of Alfred McCoy, to be paid therefrom ratably with the other creditors of that estate, to the extent that such debt is not paid in the administration of the estate of the firm of A. McCoy & Company.

C. 3.

That the said Court erred in deciding that the said appellant Abner T. Bowen was entitled to have his claim allowed against the individual estate of Alfred McCoy to be paid therefrom ratably with the other creditors of that estate.

D. 4.

That the said Court erred in finding from the evidence that there was an agreement between the claimant Abner T. Bowen and Alfred McCoy as to the two notes in question as to his signing same in his individual capacity.

E. 5.

That said Court erred in its construction of section 5, sub. F., of the Bankrupt Law, which reads as follows:—

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

F. 6.

The said Court erred in its holding that a member of a firm can become surety for the firm by affixing his signature as a maker on the face of the note as a part of the same contract, by which the partnership borrower money.

Wherefore, this appellee James H. Chapman as trustee prays that the judgment of said Court be reversed and such directions be given

as may be required under the law in such case made and provided and for all other proper relief in the premises.

JAMES H. CHAPMAN,
Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

SIMON P. THOMPSON,
FRANK FOLTZ,
Attorneys for Trustee.

Endorsed: Filed Nov. 30, 1906. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the fifth day of December, 1906, in the October term last aforesaid, came the appellee, by his counsel and filed in the office of the clerk of this court a notice, which notice is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1282, October Term, October Session, A. D. 1906.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,

vs.

JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appealed from the District Court of the United States for the District of Indiana.

Before Grosscup, Baker, and Seaman, Circuit Judges.

In the Matter of the Foregoing Cause.

To Abner T. Bowen and his attorneys, Boyd & Julien, Greeting:

You are hereby cited and admonished to appear at Chambers of Francis E. Baker as Judge of the United States Circuit Court of Appeals at the law office of Miller, Drake & Hubbell in the city of Goshen, County of Elkhart, State of Indiana on Wednesday, December 5, 1906, then the matter of the writ of errors and assignment of errors on behalf of James H. Chapman as Trustee in bankruptcy of the estate of Alfred McCoy, Bankrupt will be presented to the said Judge for an appeal of this cause to the Supreme Court of the United States of America and that said writ of error and assignment of errors were presented to the said Judge on November 30, 1906 and

that the said cause was set for hearing as above designated for said order and allowance of an appeal.

Witness my hand this 1st day of December, 1906.

JAMES H. CHAPMAN,
As Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

I acknowledge service of the foregoing notice, waiving any further service thereof.

Dated this 1st day of December, 1906.

BOYD & JULIEN,
Attorneys for Abner T. Bowen.

Endorsed: Filed Dec. 5, 1906. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the same day, to-wit: On the fifth day of December, 1906, in the October term last aforesaid, the following further proceedings were had and entered of record to-wit:

WEDNESDAY, *December* 5, 1906.

Before Hon. Francis E. Baker, Circuit Judge.

1282.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appeal to the District Court of the United States for the District of Indiana.

Be it remembered that afterwards to-wit: On the 30th day of November, 1906, the following further proceedings were had in the above entitled cause before the Honorable Francis E. Baker, Judge, in Chambers at Goshen, Elkhart County, Indiana, to-wit:

Comes now the Trustee James H. Chapman by Simon P. Thompson and Frank Foltz his solicitors and files his writ of Error for Appeal from the decision and findings of said United States Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United States and at the same time files his assignment of Errors. And the said Judge Francis E. Baker now notes the filing of said Writ of Error for appeal and Assignment of Errors, each of which is in the following words and figures (insert), setting the same for hearing in his Chambers in the City of Goshen, Elkhart County, Indiana, on December 5, 1906.

And be it further remembered that the following proceedings were had in the above entitled cause on December 5, 1906, in Chambers at the office of said Francis E. Baker in the City of Goshen, Elkhart County, Indiana.

Comes now the said James H. Chapman as Trustee by Frank Foltz, his solicitor and presents to the Court the notice served on Boyd & Julien, as follows, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1282, October Term, October Session, A. D. 1906.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appealed from the District Court of the United States for the District of Indiana.

In the Matter of the Foregoing Cause.

Before Grosscup, Baker, and Seaman, Circuit Judges.

To Abner T. Bowen and his attorneys, Boyd & Julien, Greeting:

You are hereby cited and admonished to appear at Chambers of Francis E. Baker as Judge of the United States Circuit Court of Appeals at the law office of Miller, Drake & Hubbell in the city of Goshen, County of Elkhart, State of Indiana on Wednesday, December 5, 1906, then the matter of the writ of errors and assignment of errors on behalf of James H. Chapman as Trustee in bankruptcy of the estate of Alfred McCoy, Bankrupt will be presented to the said Judge for an appeal of this cause to the Supreme Court of the United States of America and that said writ of error and assignment of errors were presented to the said Judge on November 30, 1906 and that the said cause was set for hearing as above designated for said order and allowance of an appeal.

Witness my hand this 1st day of December, 1906.

JAMES H. CHAPMAN,
As Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

I acknowledge service of the foregoing notice, waiving any further service thereof.

Dated this 1st day of December, 1906.

BOYD & JULIEN,
Attorneys for Abner T. Bowen.

And the said Abner T. Bowen comes by Morris Winfield & L. D. Boyd his solicitor- and the Judge being duly advised in the premises and after having examined the said writ of error for appeal and said assignment of errors, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1282, October Term, October Session, A. D. 1906.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appeal from the District Court of the United States for the District of Indiana.

Before Grosscup, Baker, and Seaman, Circuit Judges.

Writ of Error for an Appeal of this Cause to the Supreme Court of the United States on Behalf of Appellee James H. Chapman, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

To the Honorable Peter S. Grosscup, Francis E. Baker and William H. Seaman, Circuit Judges:

The above named defendant or appellee, James H. Chapman as Trustee in Bankruptcy of the estate of Alfred McCoy, Bankrupt in the above entitled cause, conceiving himself aggrieved by the judgment, order and decree made and entered by the above named court in the above entitled cause, under date of November 8, 1906, wherein and whereby, among other things, it was ordered, adjudged and decreed that the order in this cause rendered by the Honorable District Judge should be reversed, with instructions to the court below to allow the claim of the appellant Abner T. Bowen based upon the two notes described as follows:—

No. 35851.

"NEW YORK, *Aug. 20th*, 1903.

Ninety days after date, for value received, I promise to pay to the order of A. T. Bowen & Co. $5,000.00 Five Thousand Dollars, at the office of A. T. Bowen & Co. Bankers, 11 Wall St. New York, with interest at — per cent. per annum from — until paid.
Due —.

A. McCOY & CO.
ALFRED McCOY.
THOMAS J. McCOY."

The endorsement on the above note reads:
"Interest paid to maturity. Paid ninety & 45/100 dollars ($90.45) by balance of Account, April 1st, 1904."

No. 36010.

NEW YORK, *Nov. 6th*, 1903.

Four months after date, for value received, we promise to pay to the order of A. T. Bowen & Co., $5,000.00 Five Thousand Dollars at the office of A. T. Bowen & Co. Bankers, # 11 Wall St. New York, with interest at six per cent. per annum from maturity until paid.
Due March 6/04.

A. McCOY & CO.
ALFRED McCOY.
THOMAS J. McCOY."

P. O. Address ——.

as a debt against the individual estate of Alfred McCoy, to be paid therefrom ratably with the other creditors of that estate to the extent that such debt is not paid in the administration of the estate of the firm of A. McCoy & Company, do hereby appeal to the Supreme Court of the United States from said order, judgment and decree, for the reasons set forth in the assignment of errors, which is filed herewith; that the amount in controversy exceed- the sum of $2,000.00 and the question involved is one which might have been taken on appeal or writ of error from the Supreme Court of the State of Indiana to the Supreme Court of the United States; that it is the opinion of this trustee that the determination of the questions involved in the allowance of said claim as allowed by the finding of this court and as rejected by the Honorable Albert B. Anderson, District Judge, is essential to the uniform construction of this act throughout the United States.

I now pray that this my petition for said appeal may be allowed, and that the transcript of the record, proceedings and all papers upon which said order, judgment and decree was based and as now on file in this cause, duly authenticated, may be sent to the Supreme Court of the United States as in such cases made and provided.

Your petitioner further asks to be allowed to perfect this appeal without filing a bond as is authorized under the present bankrupt law, as this appeal is taken by the undersigned as such trustee.

Wherefore, I ask that this my petition be granted and for all other relief.

Dated this 22nd day of November, 1906.

JAMES H. CHAPMAN,
Truste in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

SIMON P. THOMPSON,
FRANK FOLTZ,
Attorneys for Trustee.

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1282, October Term, October Session, A. D. 1906.

In the Matter of ALFRED McCOY, Bankrupt.

ABNER T. BOWEN, Appellant,
vs.
JAMES H. CHAPMAN, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

Appeal from the District Court of the United States for the District of Indiana.

Before Grosscup, Baker, and Seaman, Circuit Judges.

Assignment of Errors

By the Appellee, James H. Chapman, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

To the Honorable Peter S. Grosscup, Francis E. Baker, and William H. Seaman, Circuit Judges:

And now on the 22nd day of November, 1906 came the said James H. Chapman, as Trustee in Bankruptcy of the estate of Alfred McCoy, Bankrupt, the defendant in the above entitled cause by Simon P. Thompson and Frank Foltz, his solicitors and files the following assignment of errors upon which he will rely.

A. 1.

That the United States Circuit Court of Appeals for the Seventh Circuit erred in rendering judgment against this defendant in said cause upon the pleadings in said cause, the evidence and the record and that said judgment is contrary to the law and the facts as stated in the pleadings and record in said cause.

B. 2.

That said Court erred in ordering that the order appealed from must be reversed with instructions to the court below to allow the claim as a debt against the individual estate of Alfred McCoy, to be paid therefrom ratably with the other creditors of that estate, to the extent that such debt is not paid in the administration of the estate of the firm of A. McCoy & Company.

C. 3.

That the said Court erred in deciding that the said appellant Abner T. Bowen was entitled to have his claim allowed against the individual estate of Alfred McCoy to be paid therefrom ratably with the other creditors of that estate.

D. 4.

That the said Court erred in finding from the evidence that there was an agreement between the claimant Abner T. Bowen and Alfred McCoy as to the two notes in question as to his signing same in his individual capacity.

E. 5.

That said Court erred in its construction of section 5, sub. F., of the Bankrupt Law, which reads as follows:—

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

F. 6.

The said Court erred in its holding that a member of a firm can become surety for the firm by affixing his signature as a maker on the face of the note as a part of the same contract, by which the partnership borrower money.

Wherefore, this appellee James H. Chapman as trustee prays that the judgment of said Court be reversed and such directions be given as may be required under the law in such cases made and provided and for all other proper relief in the premises.

JAMES H. CHAPMAN,
Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt.

SIMON P. THOMPSON,
FRANK FOLTZ,
Attorneys for Trustee.

And the prayer of said petition for appeal is now allowed and said appeal is authorized to be taken by the said James H. Chapman as Trustee in Bankruptcy of the estate of Alfred McCoy to the Supreme Court of the United States and the Clerk of this court is directed to enter this allowance of appeal and finding in the Order Book of said Court and is further directed to certify the record and finding of facts and judgment of this court and all Order Book entries *to* regard thereto in such cases made and provided.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 25, inclusive, contain a true copy of the papers filed (except briefs of counsel) and proceedings had thereon in the United States Circuit Court of Appeals for the Seventh Circuit, in the case of In the Matter of Alfred McCoy, Bankrupt Abner T. Bowen, *vs.* James H. Chapman, Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt, No. 1282, October Term, 1906, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this seventh day of December A. D. 1906.

[Seal United States Circuit Court of Appeals,
Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals
for the Seventh Circuit.

UNITED STATES OF AMERICA, *ss:*

To Abner T. Bowen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit wherein James H. Chapman Trustee in Bankruptcy of the Estate of Alfred McCoy, Bankrupt is appellant and you are appellee, to show cause, if any there be, why the order and decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Francis E. Baker, United States Circuit Judge this Fifth day of December, in the year of our Lord one thousand nine hundred and six.

FRANCIS E. BAKER, *Judge.*

[Endorsed:] No. —. Supreme Court of the United States. —— —— *vs.* —— ——. Citation to the Supreme Court of the United States. Filed Dec. 14 1906 Edward M. Holloway, Clerk.

On this thirteenth day of December, in the year of our Lord one thousand nine hundred and six, personally appeared Frank Foltz before me, the subscriber, and being one of the attorneys of record for James H. Chapman, Trustee in Bankruptcy of the estate of Alfred McCoy, Bankrupt and makes oath that he delivered a true copy of the within citation to L. D. Boyd Who acknowledged the receipt thereof on the back hereof by signing the name of M. Winfield and Boyd & Julien, attorneys for the defendant and affiant further states that on December 12, 1906 he delivered a true copy of the within citation to the appellee Abner T. Bowen. And further affiant saith not.

FRANK FOLTZ.

Sworn to and subscribed the 13" day of December A. D. 1906.

[Notarial Seal Jasper County, Indiana.]

BLANCHE HOYES,
Notary Public.

My commission expires July 9, 1909.

Received the within notice Dec. 12, 1906.

M. WINFIELD,
BOYD & JULIEN,
Att'ys for Def't.

Endorsed on cover: File No. 20,483. U. S. circuit court of appeals, 7th circuit. Term No. 518. James H. Chapman, as trustee in bankruptcy of the estate of Alfred McCoy, appellant, *vs.* Abner T. Bowen. Filed December 10th, 1906. File No. 20,483.

Office Supreme Court, U. S.
FILED
DEC 19 1907
JAMES H. McKENNEY,
Clerk.

No. 168.

A. D. 1907

Supreme Court of the United States

OCTOBER TERM, 1907.

No. [illegible]

JAMES A. CHAPMAN,
as [illegible] Trustee in Bankruptcy of the Estate of Alfred McCo[illegible],
Appellant,
vs.
JAMES T. HOWE,
Appellee.

Appeal from the United States Circuit Court of Appeals from the Seventh Circuit.

RECORD FILED DECEMBER 16, 1907.

(20,183.)

It is immaterial how the partners' names get on the paper; if it is a partnership debt and the firm primarily liable as between it and the individual partners, it is a firm liability and if the creditor asserts his claim against the assets of the insolvent firm, he will be estopped to say that the equity of the individual creditor is to be disregarded or that such equity never existed because the individual signing made the individual partner liable either as principal or surety.—Louisville, &c., &c. Bowman, Assignee, 79 Ky. 159.

SIMON P. THOMPSON,
FRANK FOLTZ,
Attorneys for Appellant.

JOURNAL PRINT, RENSSELAER, IND.

(20,483.)

Supreme Court of the United States

OCTOBER TERM, 1907.

1 6 8

NO. ~~548~~.

JAMES H. CHAPMAN, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF ALFRED McCOY, APPELLANT,

vs.

ABNER T. BOWEN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1907.

NO. 148

JAMES H. CHAPMAN, as Trustee in Bankruptcy of the Estate of Alfred McCoy, Appellant, vs. ABNER T. BOWEN, Appellee.	Appealed from the United States Circuit Court of Appeals for the Seventh Circuit.

APPELLANT'S BRIEF.

QUESTION STATED.

On the 8th of May, 1905, a proof of debt was filed by Claimant against the bankrupt estate of Alfred McCoy, based upon the following note:

No. 35,851. "New York, Aug. 20th, 1903. Several note.

Ninety days after date, for value received, I promise to pay to the order of A. T. Bowen & Co, $5,000.00 Five thousand——————————————Dollars, at the office of A. T. Bowen & Co, Bankers, 11 Wall St, New York, with interest at per cent. per annum from until paid.

Due..... .....

A. McCoy & Co.
ALFRED McCOY.
THOMAS J. McCOY."

Proof. Which proof reads as follows: "At Delphi, in said District, on the 4th day of May, A. D. 1905, came Abner T. Bowen, of the City of New York, in the County of New York, and the State of New York, and made oath and says that Alfred McCoy, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said deponent in the sum of $5322.88; that the consideration of said debt is as follows: Money loaned bankrupt to the amount of $5,000.00 evidenced by one promissory note for $5,000.00 executed on the 20th day of August, 1903, due ninety days after date, payable to the order of A. T. Bowen & Co., with interest at six per cent per annum from maturity, at the office of A. T. Bowen & Co. Bankers, 11 Wall Street, New York, said note falling due November 18", 1903, executed by A. McCoy & Co, Thomas J. McCoy and Alfred McCoy, that said promissory note was executed to and in favor of this deponent, who was at the date of said note, doing business in his individual capacity, under that firm name of A. T. Bowen & Co. at 11 Wall Street, in the City, County and State of New York aforesaid. Said original note is filed herewith and made a part hereto and marked Exhibit "A", that no part of said debt has been paid, except the interest to the maturity of said note, and $90.45, paid April 1st, 1904, said payments endorsed on the back of said note, that there are no set-offs or counter-claims to the same, and that the deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

And affiant further avers that at the time the note herein was executed and up to the present time, it has

been and is the law of the State of New York, under the rules of law as determined by the highest Judicial Tribunal of said State, that where a promissory note is executed by and in the name of a partnership, and for the sole benefit of such partnership, and in addition to the signature of the partnership, the separate members of such partnership join in the execution of such note by signing said note as individual makers thereof that the members of such partnership signing the note as aforesaid are severally bound, and each assume the liability of sole makers, because of the signing of his individual name to said note, and each one is bound to the same extent that he would be bound had the consideration of said note been for his sole benefit; that affiant accepted the note and loaned the money, relying on the individual liability of the partners as held in the State of New York. Proof.

(Signed) ABNER T. BOWEN,
Creditor.

Subscribed and sworn to before me this 4th day of May, A. D. 1905.

(Signed) L. D. BOYD,
(Notarial Seal) *Notary Public.*

My commission expires June 19, 1907.

Subscribed and resworn to before me this 23rd day of December, 1905.

(Signed) C. OLIVER HOLMES,
(Notarial Seal) *Notary Public.*

Com. expires Dec 2, 1908."

(Pages 4 and 5).

The Claimant also filed a proof of claim on the following note:

Joint note.

"New York, Nov. 6th, 1903, No. 36010,

Four months after date, for value received, we promise to pay to the order of A. T. Bowen & Co,—$5,000.00 Five thousand——————————————Dollars, at the office of A. T. Bowen & Co, Bankers, No. 11 Wall St. New York, with interest at six per cent. per annum from maturity until paid. A. McCoy & Co.

Due March 6, 04. Alfred McCoy.

P. O. Address..... Thomas J. McCoy."

The proof of this note is similar to the proof on the several note and is in the Record, pages 6, 7.

The parties now here made the following agreement on December 23, 1905.

Consolidation.

"Counsel for claimant Bowen and counsel for trustee stipulate that the evidence to be introduced shall apply so far as same may be applicable, to the two proofs of debt filed by plaintiff herein against the estate of Alfred McCoy, bankrupt, upon notes executed in the name of A. McCoy, Alfred McCoy and Thomas J. McCoy, and that the two proofs of debt shall be treated as consolidated." (Page 9).

The Appellant filed a motion to disallow the consolidated claims in these words:

Objections.

"First: That the allegations contained in the respective proofs are not true.

Second: That the consideration for each of said notes passed to the firm of A. McCoy & Company, and that the said Alfred Mc Coy in the signing of said notes, signed solely as a member of the firm of A. McCoy and Company.

Third: That said notes are the notes of the firm of A. Mc Coy and Company and no one else. Objections.

Fourth. That the members of a firm in their individual capacity cannot become sureties for themselves as members of a firm.

Fifth. That said claims are partnership debts and not provable against the estate of the members of the firm." (Page 8).

A hearing was had on said December 23, 1905, being the same day that the claims were subscribed, resworn to, and consolidated. On January 17, 1906, the Referee granted the motion to disallow in these words:

"And having heard the evidence submitted under said motions, and having heard the arguments respectively for and against said motions and having taken the allowance of said claims under advisement and now being advised in the premises, this referee finds for said trustee herein that said motions, should be granted; that each of said claims is not provable herein as a primary claim against this estate, and that the same should be disallowed. Referee's finding.

It is therefore ordered that said claims and each of them be, and the same hereby are disallowed as against the indivdual estate of said bankrupt, Alfred McCoy, subject only to such right as said claimant may have in said estate as a creditor of the estate of the firm of A. McCoy & Company, bankrupt, after the payment of the individual creditors of the estate of said Alfred McCoy, bankrupt." (Pages 7, 8).

On January 20, 1906, the Claimant filed his petition for review. Petition for Review.

"To the Honorable A. B. Anderson, Judge of the District Court of the United States for the District of Indiana.

Petition for Review.

The petitioner, Abner T. Bowen, doing business in the City of New York under the name of A.T. Bowen & Company, and one of the creditors of said bankrupt, respectfully represents that on the 17th day of January, 1906, manifest error to the prejudice of complainant was made by the Referee in said matter in a finding and order disallowing and expunging the claim of said Abner T. Bowen against said bankrupt, as a several claim against this estate and in ordering that the same be disallowed as against the individual estate of said bankrupt, Alfred McCoy, subject only to such rights as said claimant may have in said estate as a creditor of the estate of the firm of A. McCoy & Co., bankrupt, after payment of the individual creditors of the estate of said Alfred McCoy, bankrupt; that such order was and is erroneous in that your petitioner, Abner T. Bowen of New York, held two promissory notes; one dated August 20, 1903, for the sum of $5,000.00 due 90 days after date and the second note for $5,000.00 dated Nov. 6th, 1903, and due 4 months after date, said notes being signed by A. McCoy & Company, Alfred McCoy and Thomas McCoy, and the Referee herein should have allowed said claim to have been proved against the individual estate of Alfred McCoy, bankrupt, and your petitioner makes the following assignment of error, towit:

Assignment of errors.

First: The evidence adduced before said Referee and set out in the record shows that said notes were executed in the City of New York, and were made payable in the City of New York, and were governed by the laws in force in the State of New York, and that said laws in the State of New York, as then in force, became a part of the contract; that under the law of the State of New York, as then in force, where a note or obligation for the payment of money is signed by the

firm, in the firm name, and also signed by the individual members of the firm, as surety for the firm, the same were provable both against the estate of the partnership and against the individual estate of the members of the firm, and the petitioner became and was entitled to share equally with the general creditors of the individual members, after deducting from the general amount the sum received by him from the estate of the partnership. Assignment of errors.

Second: Under the undisputed evidence transmitted to this Court, loans were made by this petitioner to the firm of A. McCoy & Company, upon the express representation, stipulation and agreement that the individual members owned a large amount of real estate not belonging to the firm, and under the stipulation and agreement that the individual members of the firm would sign said notes, making themselves individually liable and pledging said individual property, in addition to the pledging of the partnership property.

Third: Under the undisputed evidence in this case, it is proved that the petitioner made the several loans and took said obligations upon the express represenation and condition that the individual members of the firm owned 4,000 acres of land in Jasper County, Indiana, and that the individual members, as an inducement to the petitioner to make said loan, expressly stipulated that in addition to the firm obligation, they would sign said note individually, making themselves individually liable, in addition to the liability which might arise because of the firm obligation, and the Referee erred in holding that notwithstanding said facts, the individual signatures of the members of the firm to said obligation, added nothing thereto, and that your petitioner must stand upon the same rights as the general creditors of the

Assignment of errors.

firm, and was not allowed to participate in the distribution of the individual estate until after the individual creditors had been paid.

Fourth: The Referee erred in not allowing the petitioner's claim against the estate of Alfred McCoy, and not entering an order that after deducting the amount received from the estate of the partnership, the balance of his claim should be paid equally with the other general creditors of the estate of Alfred McCoy.

Wherefore, your petitioner, Abner T. Bowen, prays that he may be decreed by the Court to have his claim against the said bankrupt estate allowed for the full amount thereof, deducting only the amount received on his claim against the firm, and that he be restored to all things lost, by reason of the finding and order of the Referee in said matter." (Pages 33 to 35).

The Referee on the 2nd day of March, 1906, filed a certified opinion of the law question involved in these words:

Question stated.

I, John O. Bowers, one of the referees of said Court in Bankruptcy, to whom said matter has been referred and before whom the same is now pending, do hereby certify that in the course of said proceedings in said cause, upon the proofs of claims of and by one Abner T. Bowen against the estate herein, upon two certain promissory notes hereinafter described, and upon the motion of the trustee herein to disallow and expunge said claims, a certified copy of which proofs of debt, and a certified copy of which motion are hereto attached, the following questions arose, pertinent to said proceedings:

Where a firm consisting of two members doing business in the State of Indiana, and desiring to borrow

money, executed promissory notes signed in the name of the firm and each of the partners thereof, to the money-lender, residing in New York, at which place the notes are payable, the firm having received the consideration, are the notes provable in bankruptcy proceedings not only against the firm estate, but against each of the individual estates? (Page 17). Question stated.

The said petition and certificate of question were submitted to the Hon. Albert B. Anderson, Judge of the District Court for the District of Indiana, who on the 25th day of April, 1906, made the following order:

"The certificate of question by the Referee upon the claims of Abner T. Bowen, evidenced by two certain promissory notes, in the sum of $5,000.00 each, having been submitted for the consideration of the court, and the court being duly advised in the premises. Order of District Judge.

It is ordered that the decision and order of the Referee thereon be and the same are hereby approved and affirmed, and that said claims be and they are hereby disallowed as against the individual estate of said bankrupt Alfred McCoy, subject only to such right as said claimant may have in said estate as a creditor of the estate of the firm of A. McCoy & Company, Bankrupt, after the payment of the individual creditors of the estate of said Alfred McCoy, bankrupt." (Pages 35, 36).

The claimant on said day last named filed his application for appeal and presented the questions made before the District Court to the Court below. (Page 40).

The Court below upon a hearing on the transcript of the record from the District Court made the following order:

"This cause came on to be heard on the transcript of the record from the District Court of the United Order of District Court.

Order of District Court.

States for the District of Indiana, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this court that the order or decree of the said district court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said district court with instructions to allow the claim as a debt against the individual estate of Alfred McCoy to be paid therefrom ratably with other creditors of the estate, to the extent that such debt is not paid in the administration of the estate of the firm of McCoy & Company." (Pages 53, 54).

The Appellant thereupon filed a petition for appeal and Judge Baker granted said appeal in these words:

Madate of Court of Appeals.

"And the prayer of said petition for appeal is now allowed and said appeal is authorized to be taken by the said James H. Chapman as Trustee in Bankruptcy of the estate of Alfred McCoy to the Supreme Court of the United States and the Clerk of this court is directed to enter this allowance of appeal and finding in the Order Book of said Court and is further directed to certify the record and finding of facts and judgment of this court and all Order Book entries to regard thereto in such case made and provided." (Page 64).

Question stated.

A question of great importance to the uniform administration of the bankrupt law is presented, which after the identification of the parties and tracing the consideration of said notes may be stated thus: Where the Bankrupt A. McCoy & Co. consisted of two general partners towit: the Bankrupt Alfred McCoy and the Bankrupt Thomas J. McCoy, who were conducting a private bank at Rensselaer, Indiana, wrote notes,

signed said notes by the firm name, A. McCoy & Co., and the partners' names Alfred McCoy, Thomas J. McCoy and mailed them to A. T. Bowen & Co.,the bank name of claimant, doing business in New York City, requesting loans of money, and the claimant, thereupon loaned the money to A. McCoy & Co. and gave credit to A. McCoy & Co. on the A. T. Bowen & Co. books for the proceeds and afterwards paid the same to A. McCoy & Co., and after Bankruptcy obtained allowances against the estate of A. McCoy & Co. on said notes, and had received dividends of 30 per cent, when the claims herein copied were resworn to and presented; are the said notes also provable as debts for dividends in competition with the individual creditors of Alfred McCoy, under the provisions of Sec 5 f of the Bankrupt law of the United States? Question stated.

STATEMENT OF THE CASE.

The bankrupts, Alfred McCoy and Thomas J. McCoy, were the general partners of A. McCoy & Co., a private bank at Rensselaer, Indiana, from the year 1896 until the filing of the petition in bankruptcy on June 18, 1904, pursuant to which petition the said bank and each partner was on July 11, 1904, adjudged a bankrupt. The estate of each bankrupt, will pay dividends, but neither will pay its debts in full. The estate of the bank had paid prior to the trial of this case before the Referee 30 per cent, and will pay an additional 10 per cent on all the bank obligations. Bankruptcy.

The Appellee was from 1896 until the petitions in bankruptcy were filed, conducting a private bank at New York City in the name of A. T. Bowen & Co. On Payments.

Payments. May 11, 1905, Appellee filed claims on the notes copied, ante, pages 1, 4, against the estate of A. McCoy & Co., obtained an allowance on the several note for $5,085.00 and on the joint note for $5,084.55, on which allowances he had received 30 per cent when the claims herein were resworn to and will receive 10 per cent additional, leaving unpaid of the allowances on the several note $3,051.00 and on the joint note $3,050.73.

Notes. The notes were written, signed, and mailed by A. McCoy & Co. to Appellee's New York address, with the request, by A. McCoy & Co., to have them discounted by Appellee, who on the receipt of each note passed to the credit of A. McCoy & Co. all the proceeds thereof, which credit was afterwards paid to A. McCoy & Co. Each note was given for an original loan of money. (Page 13). To each note Thomas J. McCoy signed the names "A. McCoy & Co., Thomas J. McCoy," while Alfred McCoy signed his own name. (Page 22). Neither partner received any part of the consideration. (Page 21) There were no previous arrangements for either loan until the receipt of the note at New York City, fully executed by the McCoys. (Page 13). The Appellee deposed as follows:

Reliance.

> "Affiant accepted the note and loaned the money relying on the INDIVIDUAL LIABILITY of the partners as held in the State of New York." (Page 5).

The Appellee afterwards testified orally as follows:

> "I relied more upon the INDIVIDUAL RESPONSIBILITY of Alfred McCoy and Thomas J. McCoy than I did upon the signature of A. McCoy & Co. OF COURSE I TOOK THAT ALL INTO CONSIDERATION." (Page 13).

The Referee finds that:

Exclusion of evidence.

"Evidence submitted touching conversations prior to the execution of the notes, particularly that portion relative to the agreement of 1896 or 1897 is considered irrelevant by the Referee." (Page 4).

The parol promise.

The Appellee testifies that Alfred McCoy in 1896 or 1897 said:

"He (Alfred McCoy) said they (Alfred McCoy and Thomas J. McCoy) would sign them (the notes then about to be executed) individually and that they (the McCoys) owned 4000 acres in their individual names, which (acres) in any event would be liable for the obligations of the bank (A. McCoy & Co.) on these notes." (Page 12).

The Referee finds that said conversation referred not to the notes now in question but notes about to be executed in 1896 or 1897. The claims were consolidated. An allowance was refused by the Referee and District Court. An allowance was directed by the Court below, from which mandate this appeal is taken.

WHAT APPELLANT CLAIMS.

The word "Claimant" means Appellee, "Bank" estate of A. McCoy & Co., "Trustee creditors of Alfred McCoy, "Obligation" promise to pay, "Liability" bound to pay and "Responsibility" able to pay.

The mandate.

First: The mandate of the Court below directs in terms the allowance of the deposed claim, $10,662.88. The opinion is that Claimant only asks the unpaid balance of $6,101.73. The allowance should not be based on the notes, but on the unpaid portion of the Bank al-

The mandate.

lowances, which at the time of trial was $7,118 68 and at the present time $6,101.73, to-wit: $3,051.00 on the first allowance and $3,050.73 on the second. The Court below had power to deal with the law and facts, and should have directed an allowance for some definite sum, so the District Court, Referee and Trustee can proceed to a final settlement of the Bankruptcy.

Lowell 2nd Ed., Secs. 110, 326, 328.
Rush vs. *Lake*, 10 A. B. R. 455.
Gaines vs. *Rugg*, 148 U. S. 228.
Anderson vs. *Shufeldt*, 181 U. S. 575.

Matereal facts.

Second: The Material Facts are those both alleged and proven (a). The Referee excluded testimony not relevant (b). (Page 4). The liability on notes can not be expanded (c); a parol promise to make property liable is void (d); a parol promise to diminish the estate under control of the Trustee is void (e); a parol promise to pay the Bank's debt to the Claimant is not executed in these notes (f). The colloquy of 1896 (pages 11, 12) is excluded from the Record. The Court should decide this case from the notes, the bank allowances and the consideration. There can be no "additional presumption" or "circumstances" to change the obligation of Alfred McCoy as a partner to that of indorser.

(a) *Roller* vs. *King*, 150 Ind. 159.

(b) Loveland, 2 Ed. Sec. 34.
Brandenberg, Sec. 695.

(c) *Reynolds* vs. *Louisville*, etc., 143 Ind. 579, 617.

(d) *Slack* vs. *Collins*, 145 Ind. 569, 571.

(e) *Clark* vs. *Russel*, 3 Dall. (U. S.) 415.

(f) *Dauss* vs. *Schrader*, 48 F. R. 816.

Third: If the Conference of 1896 or 1897 is evidence of a change of the unpaid obligations of the bank to the individual obligations of Alfred McCoy, the Court should construe the words strictly against such claim. The only act promised was "Sign them individually." The only effect was said to be that the land would be liable. (Page 12). This claim does not seek to hold the land liable. There is no promise that Alfred's individual estate should be liable, beyond his partnership liablity. The District Court rightly decided that the proposed conversation was of no weight. Weight of promise.

See opinion of Judge Anderson and authorities cited to the second claim.

Fourth: The right of Alfred McCoy to transfer his private property or private credit to help out the responsiblity of the bank wholly ceased on February 18, 1904. The right was then transferred to the body of the creditors represented by the Trustee. Parol promises made before February 18th, 1904, when not plainly reduced to writing so as to be effective without oral explanation, prove no liability beyond the law of partnership. Transfer of credit.

Sec. 5f of Bankrupt law.
Murrill vs. *Neill*, 8 Howard (U. S.) 414.
Case vs. *Beauregard*, 99 U. S. 119.
Johnson vs. *Shirley*, 152 Ind. 453, 457.
Also authorities cited with second claim.

Fifth: The law of partnership, by its own force, makes a mutual security or a pledge of all the net property of each McCoy to pay the Bank obligations. The Courts and Legislators, recognizing the absurdity of contract surety between partners and their firms made Surety.

Surety. the partnership law to exclude contract surety. It is a maxim of litigation that general partners can not sue the partnership, or vice versa, and contract surety can only be made manifest by a law suit.

Brandenberg, Secs. 68, 150.
McMillan vs. *Bullshead*, etc., 32 Ind. 11.
Howk vs. *Graham*, 123 Ind. 277, 280.
Koph vs. *Moran*, 111 Ind. 52.

Signature. Sixth: The repeated signatures "Alfred McCoy, Thomas J. McCoy", after being once written "A. McCoy & Co." to the obligations of the Bank, estops them to deny their liability as general partners and amounts to an explanation of the social name. An independent promise of a partner can not be enforced by the Bank's payee, nor can the Bank be a defendant in such suit. The three names with a proof of the partnership, indicates no idea save that of a partnership obligation. If the three names were strangers the idea of contract surety could be developed between the makers.

Brandenberg, Secs. 68, 150.
Aleman vs. *Wheeler*, 101 Ind. 14.
Smythe vs. *Scott*, 106 Ind. 248.
Dale vs. *Moffitt*, 22 Ind. 113.
Winslow vs. *Wallace*, 116 Ind. 317.
And all cases cited by the Court below.

Equity. Seventh: The Common and Bankrupt law compels the Claimant to resort only to the Bank estate, because it received the Claimant's money and because it gave its obligation. The Claimant departed with his money on the liability of the Bank, strengthened by the responsibility of its partners.

Sec. 5f of Bankrupt law.

Murrill vs. *Neill*, 8 Howard (U. S.) 414, 426.
Murray vs. *Murray*, 5 Johnson Chancery, 61, 63.
Dauss vs. *Schrader*, 48 F. R. 816, cited with approval by Judge Anderson, page 37, and Judge Grosscup, page 52.

Eighth: Not only does reason and equity point to a strict partnership liability on these notes, but the authorities are that after a claimant has taken dividends from the partnership estate, he is estopped to deny or disregard the equity of the partners' own separate creditors. Election.

Judge Clifford's opinion, 3 Cliff., 507 (pages 51, 53).
Judge Wheeler's opinion, 112 F. R. 138, 7 A. B. R. 268.
Supreme Court of Ky., 79 Ky. 133.
Also this Court, 8 Howard (U. S.) 414, 426.

Ninth: An endorser, in due course, insures in writing, the resposibility of makers. The Claimant did not procure a contract of endorsement nor a separate and distinct contract of any kind to pay. The intention of Claimant to secure a preference over other bank creditors and a transfer of Alfred's individual estate was not given effect in these notes nor was it claimed in the *prima facie* case. No Court has yet decided that the co-signing of the social and individual names to a partnership obligation creates any separate obligation on behalf of either partner. The cases cited under the supposed modification of the equity rule have never gone farther than is expressed by Mitchell in the citation made by the Court below on page 51, towit: "One Distinct contract.

who holds two independant obligations as security for a debt is entitled to avail himself of both." Every exception to the equity rule rests on an independent and distinct contract unassociated with the firm contract.

See all authorities cited in the record by the Court below, pages 51, 53.

Departure.

Tenth: The Claimant's contention is purely technical. The Claimant comes into Court falsely deposing that there was due him upon the notes from Alfred McCoy $10,662.88, when there was then due on the allowances against the Bank but $7,118.88, since paid down to $6,101.73. The Claimant also solemnly deposed that he relied upon the notes as written, and yet on the trial he sought to interject a parol "expressed representation, stipulation and agreement" that the signatures should be construed as a matter of fact as individual contracts to pay. This departure from the *prima facie* case should not be permitted.

In re Larsaw, 118 F. R. 305, 9 A. B. R. 167.

Reversal.

Eleventh: The decision and opinion of the Referee as well as the decision and opinion of the District Court are supported by law as well as the facts alleged and proven. While the opinion of the Court below is not supported by either the facts proven or the law applicable to the true facts both alleged and proven, and should be reversed.

In presenting our assignment of errors the argument will be in two parts, first the promise of 1896 or 1897 and its influence, and second, the classification of the debt represented by the obligations of the bank on these notes.

ASSIGNMENT OF ERRORS.

A 1.

That the United States Circuit Court of Appeals for the Seventh Circuit erred in rendering judgment against this defendant in said cause, upon the pleadings in said cause, the evidence and the record, and that said judgment is contrary to the law and the facts as stated in the pleadings and record in said cause. Pleadings and record.

B 2.

That said Court erred in ordering that the order appealed from must be reversed with instructions to the court below to allow the claim as a debt against the individual estate of Alfred McCoy, to be paid therefrom ratably with the other creditors of that estate, to the extent that such debt is not paid in the administration of the estate of the firm of A. McCoy & Co. Not Alfred McCoy's debt.

C 3.

That the said Court erred in deciding that the said Appellant, Abner T. Bowen, was entitled to have his claim allowed against the individual estate of Alfred McCoy to be paid therefrom ratably with the other creditors of that estate. Not Alfred McCoy's debt.

D 4.

That the said Court erred in finding from the evidence that there was an agreement between the claimant, Abner T. Bowen and Alfred McCoy, as to the two notes in question as to his signing same in his individual capacity. No parol agreement.

E 5.

That said Court erred in its construction of section 5, sub. f, of the Bankrupt Law which reads as follows:—

Statute construed.

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

F 6.

No surety.

The said Court erred in its holding that a member of a firm can become surety for the firm by affixing his signature as a maker on the face of the note as a part of the same contract, by which the partnership borrowed money. (Pages 56, 57).

ARGUMENT—ADDITIONAL PRESUMPTION. ERRORS 1, 4.

Additional Presumption.

The Appellant's averment (page 8) and proof (page 21) that A. McCoy & Co. directly received and used in their firm business all that the Appellee paid for each of the notes and that Alfred McCoy and Thomas J. McCoy are the sole partners of the firm of A. McCoy & Co., simply to trace the consideration and

identify the partners, gave the bankrupt court jurisdiction of the subject matter. As the Appellee is the sole complaining party the bankrupt court would scarcely have jurisdiction of the proper persons to adjudicate the question of surety. It is true that the bankrupt court has before it the concurrent administration of the three estates of A. McCoy & Co., Alfred McCoy and Thomas J. McCoy. The first question is whether the court has the power and jurisdiction to make a valid decree, if the facts should warrant, either of three conclusions.

Conclusions.

First. That the claim for $10,169.55 should be allowed against the individual estates of Alfred McCoy and Thomas J. McCoy to participate in the net surplus, if any, in each individual estate as a contract firm creditor. (Pages 7, 36).

Second. That a claim be allowed against the individual estate of Alfred McCoy and Thomas J. McCoy as co-sureties of A. McCoy &. Co., in the sum of $6,101.73, being for the unpaid three-fifths of the contract firm debt of $10,169.35 after deducting the payment of two-fifths made by the estate of A. McCoy & Co., as the sole principal debtors. (Page 52).

Third. That a claim be allowed against each individual estate of Alfred McCoy and Thomas J. McCoy for said sum of $10,169.55 because it is a separate debt of each of the said individual McCoys as the principal makers of said notes. (Pages 2, 53).

The first form of allowance was adopted by the Referee, (page 7) and the District Court. (Page 36). This form of allowance is the one that this Court should approve. The second form of allowance is intimated by Grosscup, J., in these words:

Surety.

"True, the proceeds of the loan having gone into the partnership estate, it may be that the individual creditors (trustee) could insist that in the marshaling of assets, the partnership estate should be exhausted before payment is made by the individual estate. That, however, is the question we do not decide, for the Appellant only seeks to prove his claim (for allowance) to the extent that it is unpaid by the partnership estate." (Page 52).

The Appellee in his errors 3 and 7, to the Circuit Court of Appeals only claims relief according to the second form. (Pages 40, 41).

The third form of allowance is made by the Court of Appeals, being for a sum, $4,067.82, more than the stated claim of the Appellee. As there will be no net surplus in either estate the Referee, (page 7) and the District Judge (page 36) gave Appellee, no immediate substantial relief as a firm creditor beyond other firm creditors. For the purposes of this argument, we will presume that the firm estate will pay two-fifths of Appellee's claim, to-wit $4,067.82. In order to determine correctly whether the individual McCoys each owe the entire debt as a principal maker, the unpaid residue of A. McCoy & Co's. debt to-wit $6,101.73, or that the debt is wholly the debt of A. McCoy & Co., requires a careful study of the record. The Appellant will first try to help the Court to determine whether, "the record shows that at the time the money was borrowed and the notes executed," there was such a conference between the parties, that would raise an additional presumption of some liability that was not expressed in either of the notes.

On this question of additional presumption, Grosscup, J., appeals to the record and therefore it is proper, to call this Court's attention to what the record does show.

Execution of notes.

First. That at the time that the money was borrowed and the notes were executed, to-wit:—on August 20th and November 6th, 1903, there was no talk between the parties at all. On this point the evidence of the Appellee is as follows:

> "You may state the circumstances of the giving of the first note, due August, 1903, how it came? Well, the note was sent to me in New York and they said if we could discount it they would like to have us do so and credit the proceeds to their account. We did so. When did you accept the note and make the loan for this, after it was received in New York? Yes sir. Had you any previous arrangements with them to make the loan? No sir. Where did you reside at that time? In New York City. What were the circumstances of the receipt of the note of November, 1903, for $5,000? They were similar. They sent the note down there and wanted us to place the proceeds to their credit. We decided to do so. When did you decide upon that? After I received it. Had you any previous arrangements with reference to making that loan? Any contract to loan it? No sir. When did you decide to make the loan, after the note was received in New York? Yes sir. What notice did you give them that you would make the loan? We notified them that we would take the notes and place the amount to their credit." (Page 13).

No consideration.

Second. Thomas J. McCoy negotiated each loan and wrote each note. Alfred McCoy did not negotiate either loan. The evidence on this point is as follows:

No consideration.

"Did you say it was signed at Rensselaer? I know that note was signed at Rensselaer. Both of them? Yes sir. I signed the firm name myself. Was Mr. Bowen present at Rensselaer when that note was signed? No sir. Either of them? He was not. Did you have any conversation with Mr. Bowen about loaning money? I don't think I ever did. To my recollection I never did." (Page 22).

Last conversation.

Third. The last conversation that Appellee had with Alfred McCoy was in the year 1897. The testimony of Appellee reads as follows:

"When was the last investigation you made? In '97 was the last conversation I had with them. (Page 13). Was this first note given for an original loan? Yes sir. The second note was given for an original loan? Yes sir.

Acceptance of loans.

"You decided in making the first loan simply from the note itself and the information you had received? Yes sir. You didn't have any communication directly with them? Not at that time. Neither one of them? Not at that time. Mr. Bowen, when you stated that the notes were sent to you, what did you mean? I received them by mail from the McCoys. State, if you know, whether they were mailed from Rensselaer, Ind.? I think they were; I think they were post marked there. The heading of the letter was from there. Was it on the regular heading of the bank? I think so. Signed A. McCoy & Co.? I think so. You gave A. McCoy & Co. credit? Yes sir. Have you the letters? No. Had you any knowledge of these notes being sent or had there been any arrangements in reference to them prior to the time of the receipt of them in the envelope, in the letter, as you have stated, in New York? No sir." (Page 14).

Conversation not in record.

The Appellant denies only the time and occasion and not what Appellee may have said to Alfred McCoy more than six years before and what Alfred McCoy may have said to Appellee more than six years before. The Appellant, however, will insist that such conversation is not in the record:

First. Because, it was rejected by the Referee (Page 4).

Second. Because, the Appellee did not ask said conversation to be restored to the record by the District Court. (Page 34).

Third. Because, the Circuit Court of Appeals did not identify and restore said conversation to the record. (Page 50).

Fourth. Because, said conversation would be incompetent and irrevelent under the law and is therefore no part of the record. The said conversation had in 1897 is the only one ever had with Alfred McCoy. As this supposed Additional Presumption is insisted upon in Appellee's error to District Court (page 34) to the Court of Appeals (pages 40 to 42) and is also given countenance by Grosscup, J., in his opinion (page 51) the Appellant will call this Court's especial attention to the fact that the same is not in the record, and if in the record is entitled to no weight.

Evidence not competent.

First. Let us concede for the sake of the argument that the record does show, as a part of the *Res-gesta*, Appellee, "thought some collateral should be put up, whereupon Alfred McCoy said, that the individual McCoys owned 4000 acres of land and they would sign the notes individually." (Page 50). Would that change the contract embodied in each note, so as to make said note evidence either of a surety or

Evidence not competent.

principal debt of the individual McCoys, divorced from their partnership relation, in addition to the firm debt of the said McCoys as partners of the firm of A. McCoy & Co.? There is no pretense that any collateral was pledged. There is no pretense that any land security was given. There is no evidence that a surety debt was contracted. There is no evidence that either of the McCoys signed in any other sense than as partners. The parol evidence, was not competent to prove any extension of the McCoys' contract obligation to Appellee.

Houch vs. *Graham*, 123, Ind. 277, 280.

Each McCoy whether he was a principal or a surety maker obligated himself and themselves to pay jointly and severally, to the Appellee, all the money he loaned upon the security of the said notes as written and signed. See Acts of Ind. 1903, page 308.

In the contract that was made in each note, was an obligation to pay just one debt to the Appellee and that debt was a partnership debt under the provisions of the bankrupt law. Section 5, sub. f.

Equity and contract.

If the notes were in form the evidence of individual debts only and the consideration all went to the firm, the individual estates might be bound under the terms of the contract and the firm estate be bound in equity because of receiving the consideration. If the notes were in form only evidence of the firm debt, and the consideration all went directly to the use of the individual partners, or one of the partners, the firm might be bound by reason of the contract and the individual estate receiving the consideration to be bound in equity.

No separate contract.

In these notes the promise is joint and several for the same debt and the consideration is traced to the firm. There is no two contracts, one equitable and the other legal. It follows therefore in the language of Clifford, Judge, in 3rd Clifford, p 507, cited by Grosscup, J., p. 51. "In a case of a mere joint and several contract, the holder must elect a joint or several remedy." One of these notes is in form joint but is made several under the law of partnership. (Page 2). The other of these notes is in form several, but is made joint by the statutory provision of the State of Indiana. Acts of 1903, p 308. The Appellee has made his election to share in the firm assets. (Pages 23, 50). With this election the Referee and District Court said he should remain content. The Appellee's desire for collateral was not gratified by a separate contract, a mortgage on the land, or a pledge of title deeds nor personal property. There was no separate contract made, hence there could be no separate lien or debt.

Second. We will now endeavor to show beyond all question that there was at the time and occasion when the loans were made no parol conference whatever but the notes were simply transferred by the bank of the McCoys' to the bank of the Appellee.

WHAT IS IN THE RECORD?

The allegation and proof.

The record shows that Appellee was doing business as a banker in the name of A. T. Bowen & Co., the payee in the two notes. This is alleged on pages 5 and 7 and is proven on page 22. Ante page 3, 4.

The record shows that the maker of each note, A. McCoy & Co., was a private banking partnership and that Alfred McCoy and Thomas J. McCoy were the general partners of said firm. This is alleged and proven. See pages 2 and 8. The record shows that on May 11, 1895, the said notes were made the sole basis of claims against the firm estate of A. McCoy & Co., which claims were allowed against said firm estate in the sum of $10,169.55. (Page 3).

We presume for the sake of this argument and from the evidence in the record, that said firm estate will probably pay $4,066.82, or two-fifths of said allowances. (Pages 3, 39). The residue left unpaid will be $6,102.73.

Did Alfred borrow the money.

The record shows that on June 18th, 1904, separate petitions were filed, and on July 11th, 1904, the copartnership of A. McCoy & Co., and each of the general partners, Alfred McCoy ond Thomas J. McCoy were adjudged to be bankrupt. (Page 3). The record shows that the Appellee, declared in his formal verified proofs of debt that Alfred McCoy borrowed the money and received the entire consideration of each of said notes. (Pages 4, 6). The Appellant, on the contrary, alleged that Appellee paid the entire consideration for each of said notes directly to A. McCoy & Co. for the use of said firm in its partnership business. (Page 8). This presented a direct issue for adjudication. The

Referee decided that the Appellee, credited A. McCoy & Co. with the face of said notes less the discount. (Pages 3, 4). The District Judge states that the partnership received the entire consideration. (Page 36). Grosscup, J., who delivered the opinion appealed from, states that the proceeds of the transactions went into the firm business. (Page 50).

Not security debt.

The allegation of the Appellee as to the consideration, was therefore shown to be false, and the Appellee's averment was shown to be true. The Appellee alleged as to each note that he "Has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received, any manner of security for said debt whatever. (Pages 5, 6). This averment would preclude the bankrupt courts from finding the existence of any lien or property security, not founded on a written contract of Alfred McCoy to pay something, beyond what the law of partnership imposes on partners to pay, upon partnership debts as evidenced by the said notes. Ante pages 3, 4.

There appears in said notes no evidence of any contract of endorsement, guaranty or pledge by Alfred McCoy and therefore pursuant to the declaration of Appellee, found on pages 4 to 7 of the record there can be no additional presumption of any separate principal, surety or secured debt, of Alfred McCoy in reference to the debt of $10,169.55 or the $6,102.73.

Claim based on notes.

The Appellee's sworn proof made the notes (page 2) the sole basis of his claims and filed copies as exhibits. (Pages 5, 6). The Appellee having declared on said written contracts, and having made no pretense of any parol agreement to enlarge the liability of Alfred McCoy, he is bound by said declaration and the verified

Claim based on notes.

proof. The formal verified proofs were sworn to on May 4, 1905, and first filed May 11, 1905. (Pages 5, 7, 2). These proofs were amended on December 23, 1905, by averring that the law of New York was,

> "That where a promissory note is executed by, and in the name of a partnership, and FOR THE SOLE BENEFIT OF SUCH PARTNERSHIP, and in addition to the signature of the partnership, the separate members of such partnership join in the execution of such note * * * * * each partner so signing is bound to the same extent that he would be bound had the consideration of said note been for his sole benefit." (Pages 5, 6).

What appellee relied on.

The Appellee states also in such amended proof that he "Accepted the note and loaned the money, relying on the individual liability of the partners as held in the State of New York." (Page 5).

This statement of what the Appellee relied on, tallies almost exactly with what Appellee swears to as a witness, to-wit:—"I relied more upon the individual responsibility of Alfred McCoy and Thomas J. McCoy than I did on the signature of A. McCoy & Co., of course I took that all into consideration." In reading the witness's statement the words, "as held in the State of New York" must be understood after the words Alfred McCoy and Thomas J. McCoy. In no word or inference did Appellee claim in his verified proof any contractural addition to either note. The notes were accepted as stating the exact and only contract between the makers and the payee. The amended declaration and proof was refiled and re-sworn to on December 23rd, 1905. (Pages 5, 7).

There is not the slightest indication of any parol agreement or understanding, before or after making the notes as any basis for an additional presumption or liability of Alfred McCoy not embodied in the notes as construed under the bankrupt law or the law of the State of New York. The claims were consolidated in these words: Parol agreement not alleged.

> *"Counsel for claimant Bowen and counsel for trustee stipulate that the evidence to be introduced shall apply so far as same may be applicable, to the two proofs of debt filed by plaintiff herein against the estate of Alfred McCoy, bankrupt, upon notes executed in the name of A. McCoy & Co., Alfred McCoy and Thomas J. McCoy, and that the two proofs of debt shall be treated as consolidated."*

The Appellant's objections in substance were save as to the consideration that the allegations contained in the respective proofs were not true. (Page 8). The conclusive evidence of the Appellee and the bankrupt, Thomas J. McCoy, both speaking the same in substance concerning the same facts shows that in each transaction all the members of the firm of A. McCoy & Co. took some part and therefore each transaction created a purely firm debt, and placed the proof of such firm indebtedness beyond all question. Brandenburgh 3rd Ed., Sec. 162. A firm debt.

The primary duty to pay each debt therefore devolved on A. McCoy & Co. because each debt was made by said firm within the scope of the firm's business and with the active assent of each partner.

Partners liable for firm debt.

Each partner was liable *in solido*, this made each partner liable for the whole debt and each partner's property became liable on ordinary execution for said debt. Under the bankrupt law, however, the trustee of each partner's estate is only permitted to turn over to the firm estate the net surplus after paying individual debts. In either case the partner is liable, in the way indicted, for the whole sum to-wit:—$10,169.55.

Brandenburgh 3rd Ed. Sec. 68, 146.

Should either of the individual McCoy's acres more than pay their private individual debts, the net surplus would become firm assets. Section 5, sub. f, g.

Outside of bankruptcy each note is simply the joint and several note of the partners, because the firm under the Indiana law, is not an entity and the statute determines the liability. Acts 1903 (Ind.) p. 308.

New York law.

The Gray and Baldwin cases were given in evidence to prove the New York law as Appellee alleged on pages 5 and 6, and said evidence is copied into the record on pages 15 to 21, and to said evidence we will refer by page. The Appellee in his assignment of errors to the District Court and Court of Appeals, admits that the said law of New York, only authorized the Court to find against Alfred McCoy a mere surety debt for the $6101.73 left unpaid from the firm estate. (Pages 34, 41). The surety debt in the Baldwin case arose from the consideration of a one man bank of James Baldwin & Co., wherein Henry Baldwin was not a general partner. Henry Baldwin as a non-partner signed his name as a surety on the following instrument:

"Addison, N. Y., June 20, 1895.

Mrs. S. Warner has deposited in this bank one thousand dollars payable to the order of herself in current funds as specified below on return of this certificate properly endorsed 6 mos. after date with 4 per cent. interest, 12 mos. after date with 5 per cent. interest, ... mos. after date with .....per cent. interest. No interest after time specified.
No. 710.

(Signed) James Baldwin & Co.
Henry Baldwin."

(Page 16).

The New York Court in the Gray case, affirmed as the settled law of the State of New York not open to question: "That the separate creditors are entitled to be first paid on the ground that their debts were contracted on the credit of the separate estates." (Page 19).

The said law of the State of New York coincides with the bankrupt law and was followed by the decree of the Referee, (page 7) and the District Judge. (Page 35).

The opinion of Grosscup, J., departs therefrom and intimates a surety debt of $6101.73. (Page 52), while the Court's order makes the notes Alfred McCoy's debt in the sum of $10169.55. (Page 53). The opinion of Grosscup, J. makes no reference to the law of New York but intimates that the law of Indiana sustains his views. (Page 51). The notes themselves do not evidence any individual debt, either as principal or surety according to the law of New York, even if the notes are New York contracts. The evidence as to the making and delivery of the notes between the partnerships to the postmaster, the use of the proceeds, the residence of the parties, and the fact that the notes

Indiana contract.

must be collected in Indiana make them Indiana contracts.

Garrague vs. *Kelley.* 164 Ind. 679, 687.

This Honorable Court on good sound reason and judgment creates the common law for the entire Nation.

Swift vs. *Tyson.* 16th Peters 1.

The New York amendment of the Appellee to his declaration (pages 5, 7) hath in fact no support in the evidence and should be considered without any merit and as if the declaration had not embodied said amendment at all, and no evidence in support thereof had been given.

It follows, that upon every material point in issue the evidence raises no additional presumption, for the evidence on all the non-contractual facts including the New York law is indisputably adverse to the Appellee's contention.

Matters in issue.

If this Court confines its attention to the matters put in issue between the parties, the orders and decisions of the Referee, (page 7), and the District Court, (page 35), are clearly right and the order of the Circuit Court is just as clearly erroneous and should be reversed. (Pages 52, 53). The bankrupt court was not authorized to find facts that constitute no part of the Plaintiff's declaration of his cause of action or of the Defendant's stated defense, and facts alleged and not proven, facts proven but not alleged, and facts neither proven or alleged, form no part of the record and should be disregarded. The Court's conclusions of fact should be wholly divorced from all irrelevant

and incompetent statements of Appellee as a witness, where they do not sustain his declaration and proof as a party claimant. The Appellee as a witness must track with himself as a pleader for the Court must follow the pleading and not the afterthought of a litigant. The rule is fundamental, that evidence is not relevant that is without the issues.

It is also the statutory law of Indiana, that parol evidence is not competent to prove the assumption of another's debt. The agreement must be in writing. Rev. St. Ind. 1881, Sec. 4904.

Statute of frauds.

An agreement of a partner to be liable beyond the law of partnership and the law of bankruptcy for a firm debt must therefore be in writing. It is also fundamental that no written liability, can be enlarged by parol evidence of any talk or understanding had or expressed prior to the execution of the written contract. The intention of the parties, must be gathered from the language that is used in the contract to which they become respectively the parties.

Reynolds vs. *Louisville, N. A. & C. Ry.* 143 Ind. 579, 617.

The monies were borrowed by the firm, used for firm purposes, the debts were single, the partnership is bankrupt and hence only the net surplus and not the net assets of the partners can be used to pay said firm debt of $10169.55 or any part thereof.

Loveland 2nd Ed. Sec. 101 and authorities cited.

Brandenburgh 3rd Ed. Sec. 165 and authorities cited.

Bankrupt law.

No additional presumption, (page 50), could be properly entertained unless relevant to some pleading, nor competent unless in writing, and should be disregarded as it was by the Referee, (page 4), and the District Court, (page 36). From September 1, 1878, to July 1st, 1898, there was no bankrupt law and hence any talk prior to July 1st, 1898, could not have in view the bankrupt law that might impair the absolute obligation of a partner to pay a firm debt.

Brandenburgh 3rd Ed. 4.

Debt.

The word "debt" in the bankrupt law, means a separate demand and right of action. Sec. 1a, 11.

The Appellee's proof would bar any pledge, mortgage or lien on any property for there is no claim of a secured debt. There is no pretense of any new promise in the declaration, hence the only promise is to be inferred from the notes applying thereto the law of partnership, the law of bankruptcy and the common law of the United States.

It may be true that the bankrupt courts, deal with the rights of creditors of the three estates as between each other, on the merits, rather than follow strict technical legal forms, yet no court should remake, at the instance of one party, written contracts, try cases beyond the pleadings, nor draw unwarranted conclusions from irrelevant evidence, when offered in an incompetent form. In re Byrne 3 Am. B. R. 269, 97 Fed. R. 760.

These notes when the consideration is traced to the partnership, express no liability of either partner as against his private, separate creditors, but simply devotes the partners surplus assets to pay the firm debts. Stevens cases 104 Fed. R. 235, 323.

If Appellee, as a firm creditor, this is admitted, should appropriate individual assets to pay said debt the right of subrogation would inhere; yet the several estates shall not claim against each other in competition with outside creditors.

Amsinck vs. *Bean*, 22nd Wall. 395.

The Appellee's formal pleading and evidence was the only notification that Appellant could have of the nature of the claims. It would work a fraud on litigants to prove a case on the evidence, that was not made in the pleadings. Brandenburgh 3rd Ed. Sec. 823. In re Sumner, 101 Fed. R. 24, 4 A. B. R. 123. These notes can be explained by identifying the parties and tracing the consideration. In re Weisenberg 12 Am. B R. 417.

Appellee plaintiff.

The Appellee stands in the shoes of a plaintiff, and can only insist that the record shows the facts that are both alleged and proven. Brandenburgh 3rd Ed. 851. No debt not stated in the verified proof, with particularity just as it accrued should be permitted to be proven by parol evidence and no court should hunt for an occasion to make double proof. Brandenburgh 3rd Ed. Sec. 862 and authorities there cited.

The Court can only conclude that these notes construed as the bankrupt law requires are the only sources of liability, or have any place in this proceeding or in this record. The rules of merger, the statute of frauds and perjuries and the issues made, exclude the additional presumption that any private individual debt can be carved out of said notes by the aid of parol evidence. The object of the offered evidence was to make a new contract (page 11) so as to

waive the application of the bankrupt law of distribution. Section 5, Sub. f. g.

Assumption.

A Court in its reasoning and opinion may assume a state of facts for the sake of the argument. Anderson, Judge, does this in these words:—

> "Petitioner apparently wishes to occupy two different positions in the matter. In his first assignment of error he claims that he occupies the relation of surety for the firm. In the other assignments he claims that the individuals expressly stipulated that 'in addition to the firm obligation, they would sign said notes individually, making themselves individually liable in addition to the liability which might arise because of the firm obligation.' " (Page 36).

Depositions.

It is pertinent here to say that before the Referee, the Appellee also occupied two positions, both of which were diverse from either position occupied before the district court, to-wit:

First: That Alfred McCoy was the principal debtor because he received all the consideration.

Second: That under the law of the State of New York Alfred McCoy was liable because he signed whether he received any consideration or not. (Pages 4, 6). Both these claims were wholly abandoned and new ones asserted in the district court. Anderson J., farther presumes for the sake of the argument as follows:

> "Suppose it be conceded that petitioner's testimony as to his extending credit upon the faith of the individual property and the circumstances of the execution of the notes was properly admitted, and that it be given full effect, then the case stands as though there had been written into the notes

an express stipulation that in the event of the bankruptcy of the firm and the members composing it, the payee shall have the right to file this note against the partnership estate and the individual estate of the partners, and share in each until this note is fully paid. In effect this is what the petitioner claims." (Page 38).

It is proper to remark here that no such previous circumstances were alluded to in Appellee's declaration and formal proof on affidavit and that all such evidence was excluded by the Referee. (Page 4). The reasoning of the district judge is conclusve, even assuming that the pleadings made such evidence relevant and that the form of the evidence was competent. Still such claims were untenable.

The learned judge cites a case which is almost just in point. To make this case as strong as the one cited, we must assume that the Appellee's claim of the antecedent contract was *allegata et probata.* The promises were neither alleged nor proven. In the case cited the partners made a separate contract to secure partnership notes that were over due. (Page 36). The contract was declared upon. The hearing was on demurrer. Here the contract was claimed to be made before the notes were made and was not declared upon. In neither case was the promised security given. Alfred McCoy simply promised that the four thousand acres, "would be liable for the obligation of the bank on these notes."

There is no pretense that he made the lands liable for the obligation of the bank on the notes copied in this brief. Ante, pages 3, 4.

A case in point.

From Judge Drummond's opinion, Anderson, J., quotes with approval the following:

"It will be seen that the agreement to convey the land was not for the purpose of payment, and if conveyed it would not have operated as such, but only as security for the payment of the indebtedness, so that the effect of the failure of the bankrupts was simply that they did not give the security which they agreed to give. The result was that the plaintiff thus gave time to the bankrupts, and the character of the debt remained unchanged. It was still a partnership debt due from the bankrupts to him. It becomes, therefore, a question of importance in this case, in view of the partnership and separate assets of the bankrupts and of the rights of their creditors, to determine whether it is equitable for the plaintiff, as against other individual creditors of Dobschutz to prove his claim against him. We have to look at the case upon the general principles of equity, and not as to the mere technical right of the plaintiff. It is true that this agreement between the parties was signed by Dobschutz and Abend individually, and there might be a technical liability against them for not giving the security which they had agreed to give; but, as has been already said, that did not change the character of the principal indebtedness, and did not make it an individual debt instead of a partnership debt. * * * * * Looking at this case in its general scope and bearing, as it appears, the various equities of the individual creditors of Dobschutz, and the character of the debt due to the plaintiff, I think that the decision of the District Court was right, and that the plaintiff ought not to be permitted to prove the claim set forth in the declaration against the individual estate of Dobschutz, and therefore that the demurrer to the declaration must be sustained." (Page 37).

Here, the only promise was, that the acres would be made liable, in any event as security for the notes. (Page 12). The acres were not made liable. The Appellee's remedy is on the promise to make the land liable. Alfred McCoy did not turn over the 4,000 acres as security. The Court must bear in mind that the only claim formulated for the principal debt was that Alfred McCoy received the full consideration. There was no intimation in the case made by the pleadings of any surety debt. For the sake of enabling the Court to easily observe just what gave rise to the so called additional presumption we present the whole colloquy between Appellee, Counsel and Referee in these words:

"Q. *You may state what arrangement, if any, you made with them in 1896 or 1897 in reference to doing business with you in the City of New York?* Colloquy.

Mr. Thompson: We object to that. Any arrangements before the notes were given would merge in the notes.

Mr. Thompson: We object because it is wholly immaterial, and because of the fact of their borrowing money is not disputed. Any arrangements made prior to the year of the note are merged in the note.

Referee: I am inclined to think that the objection should be sustained but the witness may answer.

Mr. Winfield: I should advise your honor of the nature of it. In 1896 or 1897, there were arrangements made between A. McCoy & Company and A. T. Bowen & Company of New York, whereby they might procure money from them upon collateral loan, and at that time Mr. Bowen required of them collateral for loans that he might make to them; and they said to him that they would sign individually instead of giving collateral, as they had several thousand acres of land individually, and

that proved satisfactory to Mr. Bowen, and from that time on up to 1903 they sent notes to New York when they would want money, and if signed in this way, and if satisfactory to Mr. Bowen and in a condition to loan the money he would accept the note and advance the money upon the note and give them credit with the money in their account that was kept there with them.

These are the facts that I think ought to come before this Court and if it comes up for review before the United States Court, it ought to be shown.

Referee: The evidence may be sudmitted, that is, the witness may answer and the admissibility of the evidence may be considered later. (To the witness) you may answer.

Analysis. A. I was at Rensselaer, I think, in '96 or '97 and talked with Mr. Alfred McCoy. He had been borrowing money from us at times and when he said that they would want to continue occasionally, I said, 'well, most banks are willing to put collateral when they borrow. I think you had ought to put up collateral also'.

He said that they would sign them individually and that they owned four thousand acres in their individual names, which in any event would be liable for the obligations of the bank on these notes. I said, well, I guess that is satisfactory. We would loan money in that way if the business would warrant. From time to time they sent notes, and if we had money to spare and thought the business would warrant it, we would discount them.

Q. You may state if those two, these two notes of $5,000 each, were sent to you at New York under that arrangement made with you in 1896?

Trustee: Well, we object—

Mr. Winfield: I will change that question.

Q. Were any different arrangements made from that time on until after the giving of these two notes in controversy?

A. No, sir." (Pages 11, 12.)

Conversation excluded.

The Referee in due time made his ruling that the said colloquy presented no relevant evidence. The Appellee saw the ruling, approved the same because he did not assign errors to the District Court. The colloquy is therefore no part of the record and no new or second agreement can be predicated thereon. If there is any additional presumption it is based on irrelevant testimony presented in an incompetent form and is excluded from the record. The Referee rightly concludes that no arrangement or agreement had been entered into concerning the signature of any notes executed after the year 1897. (Page 4).

The Appellee before the Court of Appeals made five claims in an assignment of errors:

First: In errors 2, 4, 5, 6 and 10, he claimed that Alfred McCoy was liable for the $10,169.55 because of the notes alone. (Pages 41, 42). In error 8 he claimed that the talk in 1897 made out a pledge of the four thousand acres to pay the $10,169.55.

In error 9 he claims that the talk in 1897 made out an individual promise to pay the $10,169.55.

In error 3 he claimed that the talk in 1897 showed that Alfred McCoy agreed to pay a surety debt of $6101.73.

In error 7 the Appellant claimed that the law of New York created a surety debt for Alfred McCoy of $6101.73. It is impossible to divine what the claim may be in this court. The asserted right to recover against

Alfred McCoy has varied in each court. The Referee had power to exclude the episode of 1897 and he ruled right. Loveland 2nd Ed., Sec. 34. Brandenburgh 3rd Ed., Sec. 695. The Circuit Court of Appeals had authority to review the law and the facts only on the errors presented to the District Court and ruled upon by said District Court.

Mueller vs. *Nugent*, 184th U. S. 1.
Elliott vs. *Toeppner*, 187th U. S. 327.

Presumption excluded.

It follows that the narrative of 1897 can add no virility to these notes and that the words of Grosscup,

> "The record shows that at the time the money was borrowed and the notes executed, Appellant said to Alfred McCoy who negotiated the loan that he (Appellant) thought some collateral ought to be put up; whereupon McCoy said that the partners individually owned four thousand acres of land and that they would sign the notes individually,"

is not a proper inference from the record, for there is nothing in the record to sustain it.

This Court can scarcely sanction a right to enforce a parol contract made in 1897 under a complaint based solely on written contracts made in 1903, that embody no reference to said parol contract. It is easy to see that the formulation of a new contract during the trial would work a fraud on the Trustee, who could only be prepared to meet the issues joined.

Promise of 1897.

We have printed the story of 1897, it has no suggestion in the depositions, it is a digression resting in parol testimony, to meet and overcome the provisions of the bankrupt law. The words, "Collateral" and "THE OBLIGATIONS OF THE BANK ON

THESE NOTES," stamp the promise as one to make "4000" acres liable, and not to sustain a personal promise to pay "THE OBLIGATIONS OF THE BANK ON THESE NOTES." There is no new promise to pay by Alfred McCoy, nor Thomas J. McCoy, as individual persons, outside of the partner's duty. The new promise is to so, sign individually, as to make the acres liable for "THE OBLIGATIONS OF THE BANK ON THESE NOTES." If the bankrupt law be as the Appellees assert the law of New York to be, then the signatures alone are sufficient, and the story of 1897 creates no additional presumption. The Appellee is asking, outside of said promise, a special distribution of the estates of the partners, so as to pay "THE OBLIGATIONS OF THE BANK ON THESE NOTES" as the personal debts of the partners. In the language of Grosscup, the signature under the circumstances made by the story of 1897 "gives what is in the nature of security upon his separate estate to the firm creditor" (page 52). The Appellee will lay great stress on the fact, that he filed his deposition against the individual partners on May 8, (page 4) and against the firm estate on May 11, 1905. (Page 3.) The record shows, however, that the proof here was re-filed and re-sworn to on December 23, 1905, (pages 5, 7) and yet there was no mention of the fact that the Appellee had then received part payment from the bank, obligated to pay these notes, nor that Alfred's estate was liable by reason of the promise of 1897. The promise of the partners was declared upon, in the Gauss case cited with approval by Judge Anderson (page 38) and in the opinion below (page 52). Some courts hold that if a partner endorses a note of

Promise of 1897.

Promise of 1897.

his firm, he stands as a stranger, to a subsequent holder and the makers. The promises of 1897 are claimed to cause the makers of a partnership note to take rank as endorsers. The same promise of 1897 is claimed to superadd a contract suretyship, upon the statutory relation of mutual surety between partners and their firm. The Appellee has not been sure of his position, for he classified Alfred McCoy before the Referee:

First: As a principal debtor, because as a maker he received all of Appellee's money.

Second: A contract debtor because he signed the note both socially and individually. These positions were not supported by the evidence and Appellee assumed before the Judges:

First: That Alfred McCoy was a contract surety for A. McCoy & Co, because of the promise of 1897.

Second: That Alfred McCoy was the express contract endorser because of the promise of 1897.

The opinion of the court below seems to favor, to some extent, both the new positions. The expressions in the opinion below, "under the circumstances" (page 51) and "additional presumption" (page 50) both allude to the promise of 1897. The expressions, "signed or endorsed," "surety upon or endorses," "indorsement or individual signature" and "signature or endorsement" all indicate that the promise of 1897 was considered sufficient to change a provision of statutory surety to that of endorsement and the position of a maker to that of an endorser. (Page 51). Aside from the promise of 1897 Alfred McCoy's name would indicate, as we maintain, nothing of a contractual force outside of the law of partnership. The fact that the prom-

ise of 1897 occurred six years before these notes were made is attempted to be bridged over by the Appellee's expression "no different arrangement was made." Grosscup, J., speaks of the promise of 1897 in the present tense, *tunc pro nunc.* This is not a fair conclusion of the Judge. There is little in what Appellee says, was said, and we must guard against rhetorical additions to the same by zealous counsel. It is nowhere indicated in the record: 1897. 1903.

That any other notes were executed in any particular form;

That Appellee accepted of these notes relying on the promise of 1897; Things not shown in record.

That either of these notes were accepted in lieu of collateral;

That Alfred McCoy ever said that he and Thomas J. McCoy owned 4,000 acres of LAND;

That Alfred McCoy ever promised that he would endorse any obligation of the bank;

That Alfred McCoy ever promised that he would become surety for the bank;

That either of these notes were attempted to be executed pursuant to the promise of 1897;

That the Appellee ever accepted the indorsement of Alfred McCoy or Thomas J. McCoy on any notes in lieu of collateral;

That Appellee ever accepted any notes relying on the fact that Alfred McCoy or Thomas J. McCoy were contract sureties thereon;

That either Alfred McCoy or Thomas J. McCoy ever promised to sign any notes as either surety or endorser;

Things not shown in record.

That Alfred McCoy ever obligated himself personally to make his individual estate liable, "FOR THE OBLIGATIONS OF THE BANK ON THESE NOTES;"

That there was or is a single circumstance out of the ordinary in making either of the loans or either of the notes;

That there was any additional presumption other than the signatures to these notes from which to infer any contract to pay "THE OBLIGATIONS OF THE BANK ON THESE NOTES."

The full extent of the promise was that there should be an individual signing and that 4,000 acres should be liable for "THE OBLIGATIONS OF THE BANK ON THESE NOTES." Neither of the promises were ever carried into effect and they both remain executory. The promise of 1897 should be as if it had never been mentioned, for the following reasons:

Reasons for excluding promise of 1897.

First: Because the Referee actually excluded the evidence thereof. (Page 4). The reasons for the Referee's actions are apparent, for the Appellee should have deposed said promise as a part of *his pleading and evidence.*

In re Stevens, 107 Fed. R. 243, 5 A. B. R. 806.
In re Scott, 93 Fed. R. 418, 1 A. B. R., 382.
In re Larsaw, 118 Fed. R. 365, 9 A. B. R. 167.

Second: The promises of 1897 remain executory and can have no influence to change the obligations of the bank on these notes to the individual obligation of Alfred McCoy to pay them.

Gauss vs. *Schrader*, 48 Fed. R. 816.
Anderson, J. pages 36 to 39.
Grosscup, J. page 53.

Third: The extension of the liability expressed in the notes from partnership obligation to individual obligation by parol was incompetent. Reasons for excluding promise of 1897.

Smith vs. *McLean*, 146 Ind. 77, 87.

Fourth: The asserted promise of 1897 was that "4000 acres" would be made liable for the obligation of the bank on these notes, was void because not in writing.

Clark vs. *Collins*, 145 Ind. 569.

Fifth: The promise of 1897 was an an attempt to prove by parol that "THE OBLIGATIONS OF THE BANK ON THESE NOTES" should compete with the individual creditors of Alfred McCoy, and was void because not in writing

Clark vs. *Russell*, 3 Dall. 415.

The only way in which a separate, several, distinct, and independent obligation to pay "THE OBLIGATIONS OF THE BANK ON THESE NOTES" could be inferred by the court below was from the promise of 1897. It was formulated to avoid the bankrupt law in its application to "THE OBLIGATIONS OF THE BANK ON THESE NOTES" and to confiscate from the individual creditors of Alfred McCoy the dividends on $10,169.55. Let the court emasculate this case from the promise of 1897 and indulge no additional presumption nor circumstance, meet the question as to whether the signature of the partners, after the signature of the partnership, does make the note the debt of the partners beyond the law of partnership, if it be the law,

Reasons for excluding promise of 1897.

then the personal credit of every partner will be shaken and no partnership name, without the names of the partners, will ever again pass current in the commercial world. Errors 1 and 4 should be sustained and the record fully stripped of all extrinsic matter so that the question can be squarely decided. It is for this court to say whether the signature of the partners to "THE OBLIGATIONS OF THE BANK ON THESE NOTES" following the partnership name authorizes a dividend bearing allowance against the estates of the partners. With the answer to that question, unincumbered with any unplead and unproved matters the Appellee will remain content.

THE DEBT—ERRORS 2, 3, 5, 6.

Classes of debt.

The bankrupt law designates two classes of debts, *partnership and individual.* Sec. 5 f. The creditor in making proof designates two classes of debt, *secured or unsecured,* a partnership or the makers of a promissory note, suggest two classes of debt, *surety* and *principal.* The Appellant contends that the debt evidenced by the consolidated note is *partnership, principal* and *unsecured.* The Appellee insists that *the part of the debt* remaining unpaid is *individual,* contract *surety,* and *unsecured.* The claimant, in his depositions, declares that there was no manner of *security* for said debt whatever. The partners' interest in the partnership estate of A. McCoy & Co. was, however, *pledged* to secure said partnership debt. The claimant, in his depositions declared Alfred McCoy was the *principal* debtor because he received *all* of claimant's money.

The truth is that *A. McCoy & Co.* received all the consideration and therefore is the *principal debtor.* The Appellee, however, now claims that Alfred McCoy bore toward the debt the relation of a *contract* surety. The claimant, in his depositions, alleged that in loaning the money he relied upon the *individual liability* of *the partners* as held in the State of New York. The truth is that the law of the State of New York, for settling insolvent partnerships, is very like, the law of Indiana and the bankrupt law itself. There is no law, that because partners place *their individual signature*, after the *firm signature*, on the face of a partnership note, that thereby, each partner as an individual person, becomes bound to pay to the same extent, as if the consideration had been for his sole benefit. (Pages 5, 7). The Appellant asked a disallowance, on the ground, that said debts were *partnership debts;* that the *obligations* were those of A. McCoy & Co.; that the *consideration* all went to A. McCoy & Co. and that the depositions *were not true* The undisputed proof by parol testimony is that Alfred McCoy and Thomas J. McCoy are the sole partners of A. McCoy & Co.; that A. McCoy & Co. received the entire consideration; that the sole members of the firm signed their respective names after the firm name, in the position of makers on the face of the note, and that there had been an allowance in claimant's favor for the full debt evidenced by said notes as a partnership debt and that the partnership had paid more than thirty per cent but would not pay the said debt in full. The law of the debts as between partnership and individual, as to the direct liabilty is fairly stated by the court below. The said Court classifies the debt of $10,169.55 as *partnership*, but

Signatures.

Signatures.

claims that the unpaid portion is also *individual.* The opinion recites the following: "*The claim disallowed was not a claim for the payment of the partnership* debt. *Had it been, the disallowance would have been proper; for both under the section of the statute, and under the pre-existing law, any surplus remaining after the payment of the individual debts would have been added to the partnership assets, and would thereby have become available to the payment of applicant's debt.*" (Page 51).

The opinion is therefore that the claimant's debt was *partnership* to draw dividends from the *partnership estate and* also to draw any surplus from either individual estate, but was *individual* so far as not paid by the *assets of the partnership* or the *surplus of the individual estate.* The depositions show an *unpaid, unsecured consideration debt* of Alfred McCoy for $10,169.55 for money loaned to him by the claimant and therefore *the claim* was for Alfred McCoy's *individual debt.* The parol evidence shows that the *claimant paid all the consideration* direct to A. McCoy & Co. and that the depositions in that respect *were not true.* We make no question that "The *claim* disallowed, was a *claim* for Alfred McCoy's *individual debt,* as much so as if Alfred McCoy had individually on a separate piece of paper, obligated himself for the debt." (Page 52). *The claim* was that Alfred McCoy received *all the consideration* and this made the debt his for the *purpose* of the *pleading,* without regard to the truth. *The claim* was for a *principal debt* of Alfred McCoy, on notes signed A. McCoy & Co., Alfred McCoy, Thomas J. McCoy because the false *claim* stated that *Alfred McCoy borrowed* and *received all of the money* from the Appellee and thus Thomas J. McCoy and A. McCoy & Co. if strangers

would bear the relation of contract co-sureties of Alfred McCoy but in fact, as *partnership* mutual sureties. The Court below says "True, the proceeds of the loan having gone into the *partnership estate*, it may be that individual creditors could insist, that in the marshaling of assets the *partnership estate should* be exhausted before *payment is made by the individual estate.*" (Page 52). The trustee for the creditors of Alfred McCoy does insist against any allowance, and if any that the allowance be for as small a sum as possible. Signatures.

The signatures meant no more than that the partnership and the partners were *mutual sureties* of each other, for under the law of partnership they all agreed "to be liable for the obligations of the bank on these notes." The words of the Referee; "*evidence admitted touching conversations prior to the execution of the notes, particularly that portion relative to the agreement in 1896 or 1897 is considered irrelevant*; (page 4) and of the district judge "*All the creditors of the firm and the individuals, composing the firm must be held to have contracted with a view to the bankrupt law and of its provisions relating to the distribution of the debtor's property in the event of bankruptcy and surely it can not be held that one creditor*, (by parol) *can make a contract with the debtor, the effect of which is to change the rule of distribution in the event of insolvency to give him an advantage over other creditors of the class to which he claims belong.*" (Page 36.) The words quoted present this case in its true light. The Referee held the parol evidence *irrelevant* and the District Judge *incompetent.* The claimant wants to be a *firm creditor* to get all dividends from the *partnership estate* and to get the surplus, if any, from the individual estate,

Signatures.

and if the partners had not been in debt the claim of an *individual debt would never have been heard of.* There is but one single consolidated obligation (page 9) to pay $10,169.55. The theory for recovery before the Referee was *consideration received*, and *liability because of signature.* (Pages 4 to 7). Before the District and Court below the theory was *suretyship by contract*, and an *express parol promise.* (Page 34). In the opinion of the Court below we find the following words:

> "There is a class of cases in which it has been held that where the creditor holds notes signed by the firm and SIGNED or endorsed also by individual members of the firm he may prove against both estates and receive dividends from both."

We have diligently searched for any such cases and we find none. Among the cases cited in the opinion are the Emery case, cited on pages 53 and 50 wherein Justice Clifford says:

> In the case of a mere joint and several note the holder must elect a joint or several remedy but the rule is otherwise where there are distinct contracts."

In the Mead case, 9366 cited on pages 51 and 53 the notes were endorsed in due course by the partner sought to be held.

In the Gray case given in evidence on page 20 the firm did not sign the note.

In the Baldwin case given in evidence on page 15 the surety was not a general partner.

In the Farnum case cited on pages 51 and 53 there was also separate and distinct contracts.

In the Winslow case cited on page 51 the partners were endorsers in due course.

Signatures.

In the Thomas case cited on page 51 there was no written obligation of the firm.

The Court below instead of saying *endorsed* alone made the cases read "*signed or endorsed.*" The cases are not claimed to be in point, but are said to reach out and toward the case at bar. The disjunctives are unequally yoked together in this form "surety upon or endorser," "indorsement or individual signature," "individual indorsement or signature." *The question here is whether the signature makes the unpaid residue of the debt, an individual debt.* The Court below says:

> "Now such separate liability would seem to be, at least, in the nature of security, though differing radically, it is true in character and form from that of a mortgage and yet double proof by the firm creditor in such case may be made." (Page 52).

The Court below no doubt selected a mortgage lien for a subject of comparison because the purely executory promise of 1897 was that the "*4,000 acres,*" *in any event, would be liable for the obligations of the bank on these notes.* Those acres could not be made liable for the *obligations of the bank, except by a mortgage.* The Court below did not strive to prevent cross-claims in distribution, but sought a mode for obtaining it that *hath no support in the bankrupt law.* The Supreme Court of Kentucky says:

> "It is immaterial how the partners' names get on the paper: if it is a partnership debt and the firm primarily liable as between it and the individual partners, it is a firm liability and if the creditor asserts his claim against the assets of the insolvent firm, he will be estopped to say that the equity of the individual creditor is to be disregarded or that

Signatures.

such equity never existed because the individual signing made the individual partner liable either as principal or surety."

Fayetteville, etc. vs. *Kenneys*, Assignee, 79 Ky. 133.

We say with the Supreme Court of Kentucky that the claimant here ought to be estopped from taking any of Alfred McCoy's individual assets away from his individual creditors. One of two courts is certainly radically wrong on the effect of signatures. The opinion of the Court below would read much better if the words "signed," "surety upon," "individual signature" and "signature" were stricken from page 51, for there is no authority to sustain the addition of said words. The Court below says that

> "Sec. 5 f. was not intended as we look at it to modify in any respect the pre-existing law. The section is indeed only a re-inactment of pre-existing law." (Page 52.)

The view of a commercial lawyer and not an equity judge is thus reflected. There had been no bankrupt law in this country from 1878 to 1898. The Court below found and can find no authority under any law to the effect that *partners' names* following the partnership's name in form as makers on the face of a note, indicates either contract suretyship, indorsement, guaranty, indemnity, pledge, mortgage, or any individual liability superadded to the joint obligation. It was, therefore, a rather bold proposition for the Court below to assert that the principle was not seriously controverted, towit that the mere signatures made inde-

pendent individual contracts. (Page 52). In truth and in fact no court, to our knowledge, ever before asserted such inequitable ambiguities at all. A liability not based on either a pledge, mortgage, or a separate promise to pay in such form as to authorize a separate suit at law against a partner, for that liability, will come within the partnership liability is very broad and is in the nature of a mutual suretyship. Signatures.

The bankrupt law makes the election referred to by Judge Clifford in the case cited by the lower court to *follow the consideration* and thus unite the legal and equitable obligation as *the debt* under the bankrupt law. Sec. 5 f.

The Referee well remarks:

> "If it be deemed the law that the individual estate of a member of a firm be bound by endorsement of firm paper, it would not follow that the individual estate would be held by the subscription of the names of the members on the face of the instrument in addition to the firm signature." (Page 30).

The District Judge adopts the opinion and conclusion of the Referee who cites many authorities and says the liability of the individual members of the firm is not superadded and gives one additional authority. (Page 37). In that authority Judge Drummond decides in a case, where the alleged promise to make land liable for the obligations of the partnership was in writing and says the agreement was to give security.

> "It is true that this agreement between the parties was signed by Dabschultz and Abend individually but that did not change the character of the indebtedness and did not make it an individual debt instead of a partnership debt." (Page 37).

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The individual allowance must rest on the separate individual contract, if there be one.

The fact is that in the court below the claimant only urged a *contract surety debt* for the court says "*The Appellant only seeks to have his claim against the individual estate allowed to the extent that it is unpaid by the partnership estate.*" (Page 52). The court below states in its opinion the following conclusion:

"*And because it is his debt it is provable under the section cited as well as under the general law.*" (Page 52).

In another part of the opinion the lower court says at common law the notes under the circumstances *are not only the obligations of the firm but also of the individuals.* (Page 51). In still another part of the opinion we find these words:

> "In addition to the presumption arising on the face of the notes with the signature thereto, the record shows that * * * * McCoy said that the partners individually owned 4,000 acres of land and that they would sign the notes individually." (Page 50).

We have shown in another part of this argument that no reference is made in the depositions to any circumstances or additional presumption and that no circumstances or additional presumption was proven. The law concludes from the notes themselves, that there was value received by some one or more of the estates represented by the makers directly from the payee. The pleadings and the law as well, called for parol testimony on just three points and no more.

Parol proof.

First: That the payee, "A. T. Bowen & Co." was the claimant Abner T. Bowen.

Second: That the maker A. McCoy & Co. consisted of just two general partners, Alfred McCoy and Thomas J. McCoy. Parol proof.

Third: That some maker or makers received the consideration. These three items being proven without contradiction, the Court must find with the Referee and District Court that the depositions touching the *consideration were not true* and that the whole debt *in equity* was and is that of A. McCoy & Co., because the consideration moved to the *partnership*. Looking at this case in its general scope and bearing as it appears from the facts, proven and considering the equities of the individual creditors of Alfred McCoy & Thomas J. McCoy, the character of the debt due to the claimant, the finding of the referee and the decision of the District Court were both right. We have taken pains to show the futility of the effort to prove any express parol promise, in 1897.

We are unable to see how the unpaid indebtedness of A. McCoy & Co., was ever changed to the indebtedness of Alfred McCoy *in an individual sense.* Judge Wheeler, looking at notes just like these says: "The joint and several notes given by the partners for partnership liabilities are none the less partnership debts, because the partners are also mutually liable. By the terms of the same section of the bankrupt act no part of the separate property is to go for partnership debts till the separate debts are fully paid. Therefore, there can be no individual estate in which these partnership creditors can be authorized to participate." Mosier case.

In re Mosier, 112 Fed. R. 138, 7. A. B. R., 268.

The estate of Alfred McCoy is clearly immune from any dividends on claimant's notes. The statute is plain and the authorities are all with the Trustee. Alfred McCoy's creditors who helped to build up the estate being distributed to them can not be thus deprived of their own property. The Court below failed to find any authorities that recognize that the signature, of the partners joined with the signature of the partnership as makers created any distinct and independent obligation of the partners. *The only way to superadd the liability of the partner is to execute a distinct, separate and independent obligation.*

Surety debt.

A surety is a co-maker who has four rights because he does not get the consideration and is therefore a favorite of the law.

First: He has a right to demand that the holder shall bring suit for his protection.

Second: He has a right on cross-complaint to have the principal's property exhausted before there is any levy on his property.

Third: He has a right of exoneration against the principal for any payment he may make.

Fourth: He has a right of contribution against his co-sureties.

In this case, if contract surety be recognized, the suits to establish these rights must work a dissolution of the partnership and exhibit litigation without adverse parties, for the payee or holder of a note is no party to any suretyship litigation. It is no concern of the holders of the note. A surety is not an endorser.

McMillan vs. *Bullshead*, etc. 32 Ind. 11.

A contract suretyship is no part of a note, but must be established in a lawsuit between co-makers.

Koph vs. *Moran*, 111 Ind., 52.

The makers of the law recognized that cross actions between partners and their firms to establish contract suretyship could not be conducted on the recognized and established principles of pleading and practice, and defined the surety relation by the law of partnership to be a mutual one and the partners are bound before they can take any part of the partnership, or their respective individual estates, to pay in full every partnership debt. The legislature and the common law having defined the suretyship between partners and their firm, no inference of any contract suretyship can be drawn from any arrangement beween the partners and their firm or between the partners and the holder of a firm obligation to either contract or expand the liability fixed by law. The partnership surety needs no law suits, for the law fixes the mutual relation of firm and partners. An endorsement, in due course, is an agreement that the makers are liable to pay and able to pay the debt. The name of the endorser, in due course, must follow the name of the payee on the back of the note. The endorser of these notes could be none other than A. T. Bowen & Co. The endorsee of a note holds in his hands two separate, distinct and independent obligations, towit, that of the maker and the endorser. A payee holds but one obligation.

Endorsement.

Smyth vs. *Scott*, 106 Ind. 245.

These notes are plain firm notes. There is absent from these notes every element of any separate inde-

Endorsement.

pendent obligation. There exists for the protection of the payee a mutual suretyship of the partners for the firm defined by the partnership law and modified by the bankrupt law. The opinion of the court below in citing cases to support the inference that a signature alone makes an independent contract was very unfortunate. In the Winslow case Judge Mitchell uses this language.

> "The contract of an endorser is entirely independent of and distinct from that of a maker, each contract being in itself conclusive of its legal import. One who holds two independent obligations as security for a debt is entitled to avail himself of both."
>
> *Aleman* vs. *Wheeler*, 101 Ind. 141.

The court below assumed not only against the Supreme Court of Kentucky but also against the Supreme Court of the State of Indiana that the contract of partners in their social and individual form is equivalent to the contract of the makers in their social form plus the contract of the individual makers *as endorsers*, in due course. The mutual suretyship of firm and members prescribed by the law of partnership is the only surety that can be carved out of these notes, and until the Appellee shall endorse the note A. T. Bowen & Co. no court has a right to mention these notes as "indorsed." The words "indorses an obligation of the firm," without the indorsement and all other references to the contract of indorsement are not germane at all to this case. The opinion of the court below was evidently written under the apprehension that the unplead and unproved ex-

ecutory promise of 1897 had a controlling force in changing the obligation of the partnership surety to a contract surety, or to change the contract of makers to endorsers, neither of which changes however could be made by any oral understanding between the individual makers and payee for all parol understandings are merged in the notes themselves.

Authorities not applicable.

The bankrupt estate of A. McCoy & Co., has some net assets and will pay some dividends to creditors of the partnership. The exception to the rule in equity of allowing partnership creditors to participate in individual effects because there were no joint effects, is therefore not applicable here. The individual McCoys are both general and contract partners and neither is in any sense an ostensible partner, and hence the Baldwin case given in evidence is not applicable. The negotiations, transactions and obligations are all regular in form and present no circumstance on their face, to raise any presumption, of any separate, several, distinct or independent liability of either firm or partner not based on the notes themselves. This leaves the liabilities to be worked out under the law of partnership as modified by the law of bankruptcy. The note of August 20, 1903 will be paid down by the joint estate to $3,051.00. This note reads "I promise to pay" and is therefore in form a joint and several obligation of the firm and its partners and makes the Mosier and Kentucky cases, cited supra, exactly in point. The note of November 6, 1903 will be paid down by the joint effects to $3,050.73. This is purely a joint obligation and even at law will only support one action. The right to recover by the claimant as asserted in the opinion of the court below is "predicated on these notes to the extent they

Authorities not applicable.

remain unpaid" (page 51) and "to the extent that it (the debt) is unpaid by the partnership estate." (P. 52). The joint note should be excluded because of its form and the claim therefore without question reduced to $3,051.00. If this controversy, was directly between the firm and its partners, and the question was as to the relation of the makers between themselves, their own conversation, at the time of signing would be admissible, as part of the *res gaesta* to show whether a contract of surety existed.

Howk vs. *Graham*, 123 Ind., 277, 280.

This controversy however, is between the creditor of a co-maker of a note and the payee and the contract must therefore speak for itself. Each of these notes was written and signed at Rensselaer, Indiana, and was delivered to the claimant at New York City through the medium of the postal service. *No conversation is shown between the McCoys themselves or with claimant at the time of signing.* The McCoys were not endorsers, in due course, for their names do not follow the name of the payee, and hence neither the Winslow, Farnum, Mead, Emery, Bradley or Bigelow cases cited by the Court below, (pages 51, 53) can here have any application The individual McCoys gave no separate notes of themselves, to the claimant, and hence neither the Thomas case cited by the Court below (page 51) nor the Gray case given in evidence (pages 19, 21) are in point. Each note was an Indiana contract not payable in any bank of that state. Hence if the McCoy partners had signed individually as endorsers or guarantors, a separate suit against them must be brought based on damages for the default of A. McCoy & Co.

The pretense of a separate contract and liability would then be plausible at law. A guarantor cannot be sued jointly with a maker.

Cole vs. *The Bank*, 60 Ind., 350.

Indorsers of notes not payable in a bank of the state can not be sued with a maker.

Dale vs. *Moffitt*, 22 Ind., 113.

In this case the liabilities of all the makers accrued on the same instrument, arose from the breach of the same contract, on the same conditions, and at the same time. On the joint note one suit would be an absolute bar and hence a claim for more than $3,051.00 should not be considered at all.

Kennard vs. *Carter*, 64 Ind., 31.

Equity.

It is therefore clear that if the promise of 1897 was provable still it remains executory and the case of *Gauss* vs. *Schrader*, 48 Fed. R. 816 is exactly in point in its reasoning and covers the whole case at bar. This case in its general scope and bearing as it appears in the facts set forth in the declarations and objections, and considering the equities of the individual creditors, and the character of the debt due the claimant and the effect of the bankrupt law, the decision of the District Court was clearly right and the claimant ought not to be permitted to have an allowance against the estate of Alfred McCoy, but should be regarded as simply a partnership creditor of A. McCoy & Co. The associate signatures of the firm, and its members on these notes, can not under the bankrupt law give any rights senior

Equity. to other firm creditors nor in competition with the consideration creditors of Alfred McCoy or Thomas J. McCoy as individual persons. The money and property of the individual creditors built up the individual estate and the claimant is not in a position to compete with them, for he placed all of his money to the credit of the partnership estate and to that estate he must look for its return. The highest court of this republic, at the December Term, 1849, in the well considered case of *Murrill* vs. *Neill*, reported 8 How., 414, approved the equity rule of Lord Loughborough, to-wit: "the plain rule of distribution is that each estate shall bear its own debts." In other words each class of consideration creditors ought to get back their money from the estate that gets it.

This Court speaking by Judge Daniel says:

"The rule of equity governing the administration of insolvent partnerships is one of familiar acceptation and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally received. The rule, with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: That partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual *property of the partners shall not be applied in extinguishment of partnership debts, until, the separate and individual creditors of the respective partners shall be paid.* The reason and foundation of this rule, or its equality and fairness,

the Court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day; at least under any motive less strong than the most urgent propriety." (Page 426). Equity.

The doctrine of Lord Loughborough, is deduced from the fundamental principles of equity, and the convenience of administration of bankrupt partnership estates and is the rule in both England and America. It is true some District and Circuit Judges having in view, the sacredness of commercial law, try to graft upon the rule various contract exceptions formulated to secure preferences. This honorable court in said cause approved the general rule stated by Justice Story in his Treatise on Partnership, sec. 376, where he says:

> "It is a general rule, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over separate debts of the bankrupt; and so, in the converse case, the separate debts are primarily payable out of the separate effects, and possess a like preference; and the surplus, only after satisfying such priorites, can be reached by the other class of creditors." *No surplus is in sight here.*

The plain rule of equity is embodied in the bankrupt law and that is that each estate must first pay its own consideration debts. The residue after performing this duty, goes to augment the other estate. We have no trouble under the rule in equity, of grappling with mixed debts arising out of the same transaction and obligation. Every debt, to draw dividends ought to be

Equity. and must be under the bankrupt law, first: a partnership debt pure and simple to draw partnership dividends as claimant's debt is now doing.

Second: An individual debt pure and simple to draw individual dividends only. There can be no mixed debts where a partnership and its members are the co-obligors. In *Murray* vs. *Murray*, 5 John. Chancery, 61, 63 the following rule was approved:

> "He who has two funds to resort to, shall not satisfy his debt out of that one to which another creditor can only resort until he has exhausted the other fund."

In Indiana it is the settled doctrine that outside of the bankrupt law, partners have right as between themselves, to insist that the firm assets shall be used first for the payment of firm debts and vice versa. The partners may however, waive such right and may transfer property from partnership to individual or vice versa. This right remains, so long as the partnership is a going concern and the right can be exercised by actual payment after due or actual security before or after due of bonafide debts of the other class. When all the property, all the debts, and all the creditors are brought into bankruptcy, for a square deal, the partners and the partnership all die financially and their right to insist upon, waive or consent to help out each other, ceases entirely. This bankrupt law stops the right four months before the petition is filed.

Case vs. *Beauregard*, 99 U. S., 119.

The right to change the law of distribution rests in Congress alone, and not in the avarice of a creditor.

The partnership of A. McCoy & Co. was when these notes were made a legal entity even in Indiana, but not to sue or be sued by, the partners. The Supreme Court of that State well say: Equity.

> "Although individuals compose partnerships, yet the partnership is a legal entity, distinct and different from the persons who constitute its component parts."

The partnership can only act by both partners helping or consenting to a transaction.

Henry vs. *Anderson*, 77 Ind., 361, 363, cited 152 Ind., 457.

The interest of A. McCoy & Co., or its creditors, in the estate of Alfred McCoy, in equity, is confined *entirely to the surplus.* The interest of Alfred McCoy or his creditors in the estate of A. McCoy & Co. is only in the surplus. (Sec. 5 f.) Even a mortgage or deed of either conveying the interest of the other would operate only on the surplus. That interest does not attach to the *corpus.*

Johnson vs. *Shirley*, 152 Ind., 453.

The equities of the creditors of each of the estates are here worked out through the medium of the Trustees. *In bankruptcy it is understood a general creditors' bill is operating all the time to protect each estate.* While the McCoys had charge of these estates the firm property by consent of the partners, could be used to pay the partners' private debts, and the individual property be used to pay the partnership debts, but this right of

Equity. actual transfer ceased on February 18, 1904. All preferences arranged to be made after that time are void and those arranged for before that time if they would defraud creditors. The right to demand, waive or consent became *functus officio* on February 18, 1904. It is only where the right was fully exercised by actual payment or by the actual conveyance of some property for security that an attempted preference can be recognized by a court in bankruptcy. The bankrupt law directs the courts to trace out and distinguish partnership and individual debts, and being pure courts of equity each estate must be protected against all preferences that remain executory to the end that each class of creditors shall share pro rata in all the *corpus* of their property. No further preferences than were actually given full effect by *payment or transfer* before February 18, 1904, should be recognized at all. Mere formal parol contracts and all executory obligations of the partners must be cast aside by the Court in obedience to the bankrupt law. The right and privilege of preying upon one estate at the expense of the other estate as between reckless partners and partnership can be given effect only when actual payment or actual transfer has been had before the estates pass under the eye of a bankrupt court. Such a court can recognize no attempt to take individual assets to pay partnership debts by any mere executory promises of the partner to the creditor of the firm. If a stipulation depriving the individual creditors of the right to have their own property applied to their own use had been written into each of these notes, (*and it could get there in no other way*) the bankrupt law would wipe it out as no part of, or evidencing any individual debt. The law of

Congress sets aside all executory promises of preference not already made effective. Equity.

The Courts in the absence of the bankrupt law, in designating independent contracts of partners connected with a firm note always require a written contract, never include partners as co-makers; but do include partners as endorsers, because an endorsement is a separate and independent contract. The case of *Winslow* vs. *Wallace*, quoted from by the Court below, (page 51) reported 116 Ind. 317 cites on page 321 the Mead, Emery and Bradley cases referred to by the Court below (pages 51, 53) and is the case on which the lower court relied. The Winslow case is characteristic of the distinction made by those judges who depart from the old English rule of recognizing only consideration creditors as entitled to dividends in an inter-partnership note. We must bear in mind that the contract of endorsement in Indiana, cannot be varied by parol, and a copy must be made a part of the complaint for recovery on an endorsement.

Smythe vs. *Scott*, 106 Ind. 245.

A DEBT is evidenced by an independent obligation to pay. Bankrupt Law, Sec. 1.

We quote from the opinion of Judge Mitchell in the Winslow case the very next sentence after the words quoted by the Court below (page 51) as follows:

> "This is upon the principle that one who holds two independent obligations, as security for a debt, is entitled to avail himself of both." 116 Ind., p. 321.

Equity. *The claimant here holds no two written contracts* or obligations.

The claimant accepted one contract in the usual form of *co-makers*. He seeks a preference because of a parol arrangement in 1897 to loan money to A. McCoy & Co. on the parol promise of Alfred McCoy that the claimant should be regarded as having a separate debt on the same note, of the partnership and of each partner so as to compete with each class of creditors. This Court should take a broad, equitable ground in apportioning each estate to those who helped to build it up. It would be a dangerous doctrine to grant to reckless partners, the power to waive by parol the effect of the bankrupt law, in protecting the different classes of creditors in the enjoyment of their own property. Favorite creditors of one class should not on such pretense also be allowed to compete with creditors of other classes.

REVIEW AND CONCLUSIONS.

First: It may be assumed that in each note A. McCoy means Alfred McCoy and Co. means Thomas J. McCoy, and that claimant loaned his money to A. McCoy & Co. The bankrupt Law based on equity, requires that no allowance be made against any estate save that of A. McCoy & Co. Each estate should pay its own debts. Equity.

Ante, pages 29, 30, 34, 38, 42.

Murrill vs. *Neill*, 8 Howard 414.

Second: The claimed obligation of Alfred McCoy is in the nature of promised security for the obligation of A. McCoy & Co., the estate of which will pay forty per cent and therefore the allowance, if any, should not in any event exceed SIX THOUSAND ONE HUNDRED ONE and 73-100 DOLLARS, being for the residue of the debts after exhausting the estate of A. McCoy & Co. Security.

Ante, pages 15, 16, 38, 39.

The law of *in solido* may apply to the obligation of partners outside of bankruptcy and to the use of the surplus, but it is only the unpaid portion that can compete with private creditors of a surety.

Third: The note of November 6, 1903, is joint in form and the allowance on said note against A. McCoy & Co. was FIVE THOUSAND EIGHTY-FOUR AND 55-100 DOLLARS. The claimant having taken an allowance against the estate of A. McCoy & Co. has exhausted his remedy and therefore the allowance here, Joint note.

if any, should not exceed THREE THOUSAND AND FIFTY-ONE DOLLARS, being 60 per cent of the several notes.

Ante, pages 15, 17, 18, 22, and authorities cited by Court below.

Several note.

Fourth. The note of August 20, 1903, is joint and several in form. The claimant having elected a joint remedy, and having obtained an allowance of FIVE THOUSAND and EIGHTY-FIVE DOLLARS against the estate of A. McCoy & Co. is therefore estopped to deny the equities of Alfred McCoy's creditors until they are paid, and hence there should be no allowance at all.

Ante, pages 17, 18, 21, 22.

Emery case cited by Court below (pages 51, 53).

Gauss vs. *Schraeder*, cited by Court below (page 52).

Kenney case, 79 Ky. 133.

Mosier case, 112 Fed. R. 138.

Claim not true.

Fifth: The Claimant deposed, as the substance of his prima facie case, for an allowance against the estate of Alfred McCoy, on December 23, 1905, being the day of the hearing before the Referee, to four material facts, three of which were untrue and the untruth of the fourth is contended for by the claimant as his sole reliance for recovery.

Consideration.

FACT 1. The DEPOSITION is that the consideration of each note was FIVE THOUSAND DOLLARS loaned directly to Alfred McCoy. THE

TRUTH is that each note was mailed to claimant by A. McCoy & Co. with a written request from A. McCoy & Co., for a loan and in response to said request the claimant loaned his money to A. McCoy & Co. and credited A. McCoy & Co. with the same. Consideration.

Ante, pages 17, 18, 22.

FACT 2. The Claimant deposed that he had *no security* for the alleged debt of Alfred McCoy evidenced by either of said notes. The truth is that Claimant then had an allowance against the estate of A. McCoy & Co. on the several note for FIVE THOUSAND AND EIGHTY-FIVE DOLLARS and on the joint note for FIVE THOUSAND EIGHTY-FOUR AND 52-100 DOLLARS, and was receiving dividends. Security.

Ante, page 23.

FACT 3. The Claimant deposed that no part of the debt evidenced by either note had been paid. The truth is that claimant had then been paid upon the allowance in which was merged the joint note FIFTEEN HUNDRED TWENTY FIVE AND 36-100 DOLLARS and on the allowance based on the several note FIFTEEN HUNDRED TWENTY-FIVE and 50-100 DOLLARS. Ante, page 22. Payment.

FACT 4. The deposition states that the claimant relied on the fact that each note was a New York Contract and that the law of New York made the debt that of each partner because they joined their individual names with the name of the firm as makers. *This was deposing there was no other reliance.* The Claimant on the trial attempted to show by his own testimony that Reliance.

Reliance. in 1897 Alfred McCoy made oral, certain representations and promises that Claimant relied upon for the loan of money on these notes. The Court below refers to said contradiction as having the influence of an "additional presumption" (page 50), "circumstances" (page 51), "surety and indorsement" (page 51), and "security" (page 52). The Appellant has shown that the contradictory promise on oath was irrelevant, incompetent, executory, inadequate, futile and untrue and therefore could give rise to no circumstance, presumption, surety, security, nor endorsement.

Ante pages 14 to 44.

No other grounds. Sixth. The Claimant having asked an allowance on the ground that each loan was made directly to Alfred McCoy without security or payment of any kind and relying on the New York law as to the signatures alone and having failed to maintain the truth of his written claim for an allowance must not be permitted to have an allowance on any other grounds.

Ante, pages 23, 33 to 44.

Surety. Seventh. The law of partnership makes the partners and their firm the mutual sureties of each other to the extent that neither partner can claim any property, exempt from liability, to pay the partnership debts. There is left therefore no room for any contract suretyship between the partners and the partnership, and none could exist.

Ante, pages 26, 27, 44 to 60.

Eighth. The promise of 1897, if true and provable, is to make "*acres*" liable for the obligations of A. McCoy & Co. The proposed individual signing was to accomplish that purpose. This was virtually a promise to give a mortgage and remains executory, and could change no part of the debt of A. McCoy & Co. into the debt of Alfred McCoy and was void because in parol. Acres liable.

Ante, pages 35, 36, 41, 42.

Gauss vs. *Schraeder*, 48 Fed. Rep., p. 816.

Slack vs. *Collins*, 145 Ind. 569.

Ninth. The promise of 1897, if true or provable, was not to make the partners liable; but the acres. The mere signature adds nothing to the law of partnership; which requires that all the acres of the partners shall stand good for every partnership debt without any other special contract. Individual liability.

Ante, pages 35, 36, 41, 42.

Tenth. The promise of 1897, if true and provable, contains no promise of Alfred McCoy to pay "THE OBLIGATIONS OF THE BANK ON THESE NOTES." No promise to pay.

Ante, pages 35, 36, 41, 42.

Conclusion.

The receipt of the consideration by the firm determines the true relation of the partners to the firm and the bankrupt law defines that relation and forbids an allowance against the partner. With profound respect for the ability of the lower court, it is clear that its opinion was wrong.

The Appellant submits that the learned Court below erred in its decision and therefore this Court should reverse the decision of the Court below and affirm the decision of the District Court.

Respectfully submitted,

SIMON P. THOMPSON,

FRANK FOLTZ,

Harry R. Kurrie

Attorneys for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 518.

JAMES H. CHAPMAN, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF ALFRED McCOY, APPELLANT,

vs.

ABNER T. BOWEN,

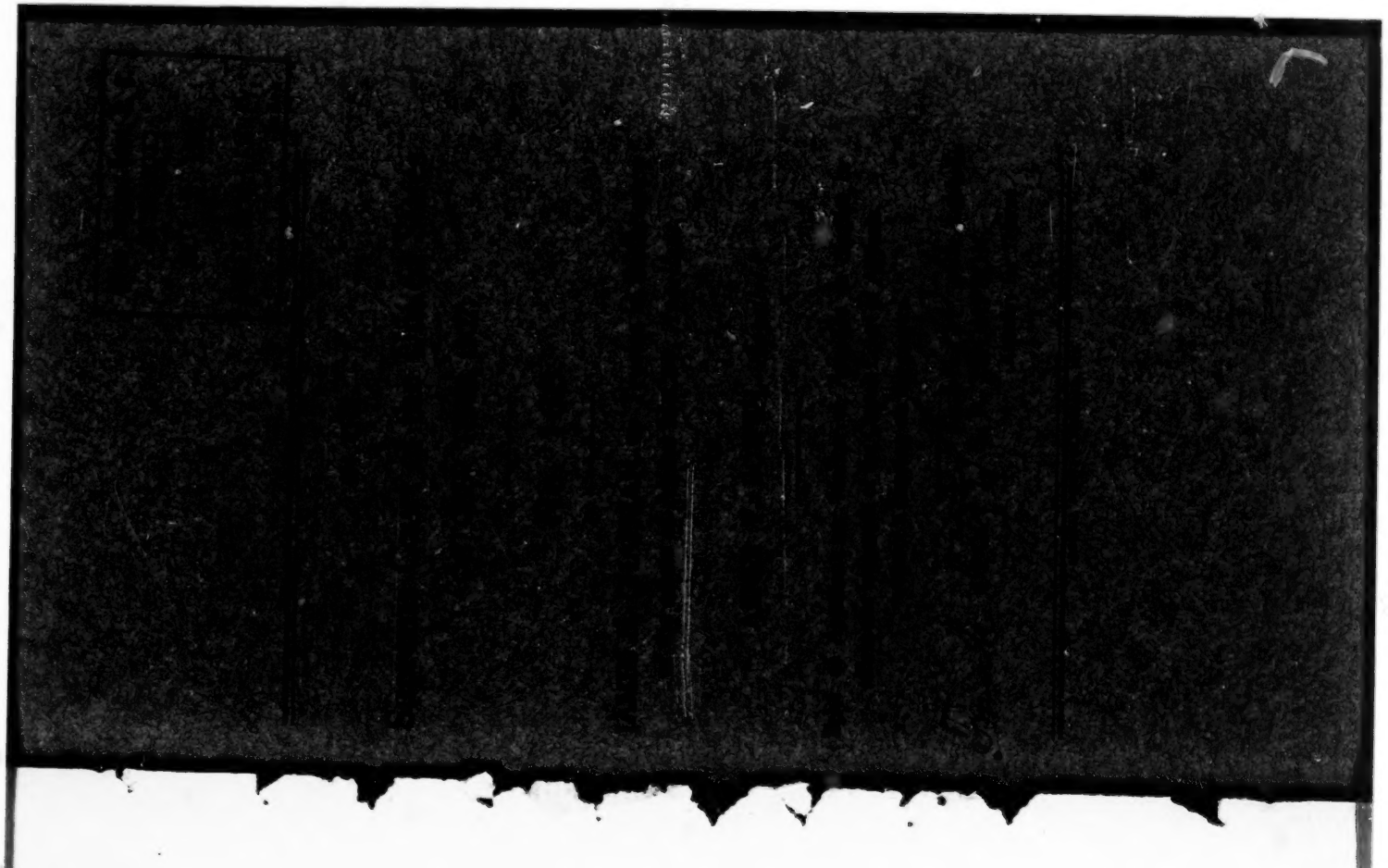
MOTION TO DISMISS OR AFFIRM.

Comes now the appellee, Abner T. Bowen, and moves the Court to dismiss or affirm the judgment of the Circuit Court of Appeals and for cause says:

FIRST: Appellant has failed in his appeal to comply with Clause 3 of Rule 36, adopted by this Court on the 28th day of November, 1898, in this: There was no finding of facts in the Circuit Court of Appeals made and filed in that Court and conclusions of law thereon separately stated, but the appellant has appealed generally, bringing to this Court the entire case in contravention of said Rule 36.

SECOND: That said case is not appealable to this Court.

M. WINFIELD.
Attorney for Appellee.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 168.

JAMES H. CHAPMAN, as Trustee in Bankruptcy of the estate of Alfred McCoy, *Appellant*,

vs.

ABNER T. BOWEN, *Appellee*.

Brief of Appellant on Motion of Appellee to dismiss or affirm the judgment of the Circuit Court of Appeals without a hearing on the merits.

STATEMENT OF RECORD.

First. The Appellee deposes on pages 4 and 6 that he was the payee in each note, and was doing a banking business under the firm name of A. T. Bowen & Co. at No. 11 Wall street, in the City, County and State of New York. The Court on page 50 found that said fact was true.

Second. The Appellee deposed on pages 4 and 6 that each note was executed by A. McCoy & Co.,

Thomas J. McCoy, Alfred McCoy, but did not allege them to be a firm and partners. The Trustee alleged on page 8 that Alfred McCoy signed as a member of A. McCoy & Co., and the notes were therefore the notes of said firm. The firm and partners were on July 11, 1904, adjudged bankrupt as of the date of the petition, towit: June 18, 1904. The Court below on page 50 found the partnership relation and bankruptcy, as a fact.

Third. The Appellee deposed on pages 4 and 6 that his money went to Alfred McCoy. The Trustee averred on page 8 that A. McCoy & Co. received the money. The Court below on page 50 found upon that issuable fact.

Fourth. The Appellee deposed on pages 4 and 6 that the amount of the debt was the face of the notes, and interest, that said debt was all due from Alfred McCoy and no part of it was paid. The Trustee on page 8 denied this. It was agreed on page 23 that the whole debt had been allowed against the estate of A. McCoy & Co. and part of it paid. The Court found on page 50 that such allowance was had, and that 30 per cent had been paid.

Fifth. The Appellee deposed on pages 4 and 6 that Alfred McCoy as the principal owed all the debt. On pages 33 to 35 he alleged in his petition to the District Court, and on pages 39 to 42 in his petition to the Circuit Court of Appeals that only that part of the debt left after exhausting the estate of A. McCoy & Co. in dividends was due from the estate of Alfred McCoy as a surety. The Court below, found on page 50, in accordance with the latter claim.

Sixth. The Appellee deposed in his *prima facie* case, pages 4 to 7, to nothing save the face of the note and the signatures as of any debt producing force. The Appellee, however, in his petition to the District Court, on pages 33 to 35, and to the Circuit Court of Appeals on pages 40 to 42 based his right to recover on extrinsic, parol understandings, representations, stipulations and agreements. The Court below on pages 50 and 51 refers in a periphrastic manner to the Record as sustaining such addition to the prima facie case. The Referee on page 7 ordered the claims disallowed, and certified the question at Appellee's instance on page 1 to the District Court, in these words:

Question Stated.

"I, John O. Bowers, one of the referees of said Court in Bankruptcy, to whom said matter has been referred and before whom the same is now pend- do hereby certify that in the course of said proceedings in said cause, upon the proofs of claims of and by one Abner T. Bowen against the estate herein, upon two certain promissory notes hereinafter described, and upon the motion of the trustee herein to disallow and expunge said claims, a certified copy of which proofs of debt, and a certified copy of which motion are hereto attached, the following question arose, pertinent to said proceedings. Where a firm consisting of two members doing business in the State of Indiana, and desiring to borrow money, executed promissory notes signed in the name of the firm and each of the partners thereof to the money lender, residing in New York, at which place the notes are payable, the firm having received the consideration, are the notes provable in bankruptcy proceedings not only against the firm estate, but against each of the individual estates?"

The District Court, on pages 35 and 36, affirmed the decision and order of the Referee. The Circuit Court of Appeals on page 53, as a conclusion of law, granted the relief prayed by Appellee on page 35 and adjudged that the District Court ascertain and allow the unpaid residue of said debt after exhausting all the estate of A. McCoy & Co.

From What Appeal Taken.

From that judgment and mandate this appeal is prosecuted under section 25 b 1, and rule XXXVI of this Court, Sec. 3.

This case having been in three courts and the claimant having changed the nature of his claim in each court, it was deemed safer to include in the record not only the claimant's sworn declaration in equity, on pages 4 to 7 and appealed to in the prayer to the Circuit Court of Appeals on page 42; the written motion to disallow on page 8; the agreement to consolidate on page 9; the mutual agreement as to what the record might show on page 23; the certificate of question on page 1; the petition to the District Court, pages 33 to 35; and the petition to the Circuit Court of Appeals, pages 39 to 42, as well as the petition for this appeal on pages 61 to 64 as part of the pleadings. Because the Claimant in his petition and pleadings avers on page 34 in assignment, First, "the evidence adduced before the referee and set out in the record shows, etc." and in assignment second "Under the undisputed evidence transmitted to this court, etc.," and in assignment third "Under the undisputed evidence in this case, etc." and that the Claimant also in his petition and pleading to the Circuit Court of Appeals embodies therein, among other things in assignment

third "The court erred in refusing to consider the evidence in the record * * * * tending to show that said Alfred McCoy, intended to sign the notes as surety, etc;" in assignments fourth, fifth and sixth "Because the evidence showed, etc.;" in assignment seventh, "The evidence adduced before the referee and set out in the record shows, etc." In assignment eighth "Under the undisputed evidence transmitted, etc.;" in assignment ninth "Under the undisputed evidence in this case, it is proved, etc." and the Circuit Court of Appeals on page 50 also having stated as to one matter, "The record shows, etc.," the Trustee entertained a very distinct impression that all of the evidence was made by said references, a part of the pleadings, and therefore it was safer to include in this record the evidence adduced from pages 9 to 23, as a part of the pleadings addressed to the District Court, and the Circuit Court of Appeals by the Appellee. The Court below also having appealed to the record as showing an added presumption to the notes, the Trustee has presented the whole record to this Court and it can eliminate all that is not pertinent to either maintain or challenge the judgment, which judgment is based on a theory not hinted at in the Claimant's *prima facie* case, as stated for the Court below on pages 4 to 7.

ARGUMENT.

The Appellant submits to the Court that this Record does show that the Court below, complied with this Court's order, XXXVI, Sec. 3, at or before the time of entering its judgment, and did make as the Record shows on page 50, a finding of facts in these words:

Finding of Facts.

"The appeal is from an order disallowing the claim of appellant against the individual estate of Alfred McCoy, bankrupt," subject only to such right as appellant might have in said estate as a creditor of the estate of A. McCoy & Co., bankrupt, after the payment of the individual creditors of the estate of Alfred McCoy, bankrupt. The facts are stated in the opinion. * * *

The firm of A. McCoy & Co., was at the time of the adjudication of bankruptcy, a co-partnership at Rensselaer, Indiana, the partners being Alfred McCoy and Thomas J. McCoy, likewise bankrupts; both the firm and the individuals having been adjudged bankrupts July 11, 1904.

The Appellant was at the time of the transaction in question, a banker in New York City, doing business under the name of A. T. Bowen & Co. August 20, 1903, there was borrowed from Appellant, upon ninety days' time, the sum of five thousand dollars, and on November 6, 1903, the further sum of five thousand dollars, for which two promissory notes were given, signed by the firm of A. McCoy & Co., and by the individual names Alfred McCoy and Thomas McCoy; the proceeds of the transaction going into the co-partnership business. Upon the firm becoming bankrupt, and the individual partners becoming bankrupt also, these notes were presented and allowed as claims against the firm, and payments thereon have been made to the extent of thirty per cent. The claim presented against the estate of Alfred McCoy, and disallowed is predicated on these notes to the extent that they remain unpaid. In addition to the presumption arising on the face of the notes, with the signatures thereto, the record shows that at the time the money was borrowed and the notes

executed, Appellant said to Alfred McCoy, who negotiated the loan, that he (appellant) "thought some collateral ought to be put up," whereupon McCoy said that the partners "individually owned four thousand acres of land, and that they would sign the notes individually."

The Circuit Court of Appeals does state that the facts are stated in the opinion, and the facts which we have quoted form the preface or introduction to the body of the opinion. The citation of authorities as well as the reasons and analogies commence with the words "At common law" on page 51 and ends with the sentence, "Indeed it is doubtful if the old rule is now in force in England" on page 53. The reasons and authorities are stated consecutively and after they are fully stated, we find the conclusion of law on page 53 as follows:

Conclusion of Law.

> "The order appealed from must be reversed, with instructions to the court below to allow the claim as a debt against the individual estate of Alfred McCoy, to be paid therefrom ratably with the other creditors of that estate, to the extent that such debt is not paid in the administration of the estate of the firm of A. McCoy & Co."

The Court also records that on the 8th day of November, 1906, being the same day on which the facts were recorded, the opinion presented and the conclusions of law, recorded the following:

Judgment Appealed From.

> "This Cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Indiana and was argued by counsel.

> On consideration whereof, It is now ordered, adjudged and decreed by this court that the order or decree of the said district court in this cause be, and the same is hereby reversed with costs; and that this cause be and the same is remanded to the said district court with instructions to allow the claim as a debt against the individual estate of Alfred McCoy to be paid therefrom ratably with other creditors of the estate, to the extent that such debt is not paid in the administration of the estate of the firm of McCoy & Company."

The words of the Court from the words "The facts are stated in the opinion" on page 50 to the words "signed the notes individually" on page 51 there is not one word of argument or comment based on either facts or law.

Analysis.

From the words "At common law" on page 51 to the words "force in England" on page 53 there is not one word of comment on evidence, nor any pretense to recite any part of the testimony to support the court's opinion. The case of Insurance Co. vs. Tweed, 7 Wallace 44, in its facts is very diverse from the facts in this case. In this case the Court makes no recital of the testimony in its statement of the facts save in the last paragraph, commencing "In addition to the presumption" and as said paragraph pertains to a matter not in issue, the Trustee consents that it may be eliminated as evidential,for without it, the statement of facts is ample and complete. The other cases cited by Appellee are not in point here. The rule of this Court does not prescribe that the finding of facts, the conclusion of law and the judgment shall be separately signed by the judges, or that any exceptions shall be

taken or recorded to the conclusion of law. It is sufficient that the four parts of the record, to-wit, the facts, reasons, the conclusion and the judgment shall be separately stated as they are here. This record as we have shown does contain the pleadings addressed to the trial court on pages 4 to 8, the notes as exhibits on pages 2 and 3, the agreement to consolidate on page 9, the motion to disallow on page 8, and the mutual admissions on page 23. It also contains the certificate of question on page 1 and the petition of the claimant addressed to the District Court on pages 33 to 35, also the petition to the Circuit Court of Appeals on pages 39 to 42, and the petition of the Trustee to this Court on pages 61 to 64.

The Court here did all that the Statute required of it.

First. It stated the inferential facts, *secundum allegata et probata* on page 50.

Second. It interpreted the Statute of Bankruptcy, by citing authorities and by reason and analogy. Pages 51 to 53.

Third. On page 53 it stated its conclusion of law.

Fourth. On pages 53 and 54 it set forth the judgment and mandate of the Court. There is no recital of the testimony as to the value received, the identification of the payee, the explanation of the maker, A. McCoy & Co., or as to the Appellee receiving dividends from the estate of A. McCoy & Co.

So that in the light of the findings each note is made to read "*for value received by A. McCoy & Co., a firm composed of Alfred McCoy* and Thomas J. McCoy, promised to pay Abner T. Bowen." This Court only required a reasonable conformity to its order. The

statute of bankruptcy as a scheme seeks to reach the merits of the controversy and not to enfore technicalities.

The amount involved as deposed by claimant on page 4 and 6 is $10,662.88, and is five fold more than the jurisdictional amount of $2000.00. The determination of the proper rule of distribution under section 5 sub f of the Bankrupt law is essential to the uniform operation of the bankrupt act throughout the United States. It requires very little care and less trouble to discover in this record the pleadings, page 4 to 9, 33 to 35 and 39 to 42, the agreements, page 23, the statement of facts found, page 50, the exposition of the statute by the Court below pages 51 to 53; the conclusion of law on page 53 and the judgment appealed from, pages 53 to 54, and that is sufficient. The trustee addresses his first error to the pleadings, and the facts found. His errors second and third are exceptions to the conclusion of law, error four charges that there was no evidence to sustain the evidentiary fact stated in the concluding paragraph; error five challenges the construction placed on section 5 of the Bankrupt law, and error six challenges the conclusion of law that the estate of Alfred McCoy is a surety. While the finding of facts may not be as elaborate in its detail as counsel on either side might wish, yet it seems to state all the facts that were put in issue before the trial court. The primary debtor, the lodgment of the consideration, the true payee, the partial payment and the components of A. McCoy & Co., are all the salient propositions that were put in issue on the pleadings or agreed to, and they will enable this court to decide the merits of the case at bar.

Exceptions.

The four statements of the Court are sufficiently distinctive in presentation as not to be objectionable. In fact the record is a very model of brevity and clearness. The court's reasons for the conclusion of law separate the statement of facts from the conclusion of law. While this record may possibly be succeptible to a motion touching the cost of the transcript, yet even the full record ought to be excused by allusions thereto in the petitions to the district and circuit court of appeals.

It is much better to have too much rather than too little before the Court. The Court can dispose of a surplus much easier than it can supply a deficiency. There should be no particular trouble over the surplus in this record. It is all here, and in a search for the truth the trustee, claimant, counsel and Court should be glad that the field of enquiry is as broad as necessity and exact justice to all creditors under the rule of distribution prescribed by congress, seems to require. The alternative motion to dismiss or affirm the judgment of the Circuit Court of appeals without hearing the case on the merits should be denied or at least held under advisement until its merits and the true merits of the case at bar are considered in argument and decided by this Court after such argument. The Trustee on behalf of the primary creditors of Alfred McCoy is insisting that no part of the estate he represents can be appropriated to pay the Appellee's debt or any part thereof, and will show this court if permitted to do so. It is important not only in this case but in all other similar cases to know whether appellee's debt is or is not the primary and dividend bearing debt of more than one estate. The Court's reasoning,

conclusion of law and judgment are all supposed to be applicable to the stated facts and pleadings.

Claimant's pleadings assert on Record, pages 4 and 6 that Alfred McCoy is a Bankrupt. (No mention of his co-bankrupts is made). That said Bankrupt was indebted to claimant at the time of Bankruptcy, and at the time of proving the *prima facie* case. That the consideration of said debt was money loaned to said bankrupt. That said debt was evidenced by promissory notes, signed Alfred McCoy, Thomas J. McCoy, A. McCoy & Co. (No mention is made of the partnership.) That said indebtedness was due to the deponent, who in said notes was called A. T. Bowen & Co. On page 9 claimant agreed to consolidate said proofs of debt. On page 8 the Trustee denied the facts stated by Claimant, and averred that Alfred McCoy was a member of the firm of A. McCoy & Co., and signed the notes as such member, and that the debts were A. McCoy & Co.'s debts. The Court below found on page 50 upon said facts so put in issue, in substance that the firm of A. McCoy & Co. was composed of Alfred McCoy and Thomas J. McCoy; that A. T. Bowen & Co., the payee, was Abner T. Bowen; that claimant's money became a part of the A. McCoy & Co. estate, and that claimant had obtained an allowance for the whole debt against the estate of A. McCoy & Co. and that 30 per cent of it had been paid. It goes without saying that before Bankrutcy the whole debt was due and owing by Alfred McCoy and Thomas J. McCoy and there was no legal remedy against A. McCoy & Co., as a separate entity, for it was a mere social name of the two McCoys, as A. T. Bowen and Co. was a social name for Abner T. Bowen. In Bankruptcy, a partnership

Trustee is appointed and to his trust is apportioned its own estate, and all of that estate is appropriated to pay primary partnership debts. In the light of the Court's findings the consolidated obligations may be read "For $10,000 received by the Bankrupt estate of A. McCoy & Co. from Abner T. Bowen, it will pay dividends thereon to said Abner T. Bowen."

The three estates stand in the place of the two estates before bankruptcy, and the debts of each of the three estates as between each other are directed to be paid exactly according to the lodgment of the fruits of the debt transaction. Each trustee handles appropriated property of his own bankrupt exclusively to pay dividends on the primary debts of said bankrupt, and he cannot be authorized to missappropriate any part of his trust.

The bankrupt law of 1898 seems to be an enactment of the old Roman and English rule as to the segregation and distribution of the separate estates of a bankrupt partnership and its partners, which rule seems to be the accepted law of the United States," (8 How, 414), New York, (5 Johns Ch. 61) and Indiana (100 Ind. 593). The facts here bar every known exception heretofore discovered by any Court.

Priority. *The Claimant is not a petitioning creditor.*

No Firm Estate. *This firm is paying dividends.*

Separate Makers. This firm made the obligations.

Indorsement. This payee is the Claimant and there is no indorsement.

Election. The obligations are joint and several notes and claimant has elected a firm remedy.

Estoppel. The claimant has asserted his debts against the firm.

Appropriation. All of Alfred McCoy's estate is otherwise appropriated.

Alfred McCoy and Thomas J. McCoy were the only makers before Bankruptcy. The Bankrupt law construes A. McCoy & Co. to be the only maker after bankruptcy. This Trustee could not and did not agree with claimant that the estate under his control should be surety that the estate of A. McCoy & Co. would pay claimant's debts in full. Before Bankruptcy A. McCoy & Co. was not such an entity that it could be a party to any contract of suretyship on behalf of either Alfred McCoy or Thomas J. McCoy. The fact was that the debts were contracted between bank and bank, each having explicit faith that the other bank was solvent. The motion to dismiss or to affirm the judgment of the court below, without considering the merits of the case should be overruled and the case set down for oral argument.

Harry R. Currie,
Frank Foltz and S. P. THOMPSON,
Attorney for the Trustee of Alfred McCoy's Estate in Bankruptcy, Appellant.

CHAPMAN, TRUSTEE IN BANKRUPTCY OF McCOY, v. BOWEN.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 168. Submitted October 14, 1907.—Decided November 11, 1907.

Clause 3 of general order in bankruptcy XXXVI applies to appealable cases and must be complied with.

This appeal cannot be maintained because it does not come within either paragraph 1 or paragraph 2 of § 25 *b* of the bankruptcy act.

Where the decision below proceeds on principles of general law broad enough to sustain it without reference to provisions of the bankruptcy act, the question involved is not one which would justify a writ of error from the highest court of a State to this court.

Appeal from 150 Fed. Rep. 106, dismissed.

THE firm of A. McCoy & Company, a banking copartnership at Rensselaer, Indiana, was composed of Alfred McCoy and Thomas McCoy, and on July 11, 1904, the copartnership and its individual members were respectively adjudicated bankrupts.

Abner T. Bowen presented claims, on notes signed by the firm and also by its members, against the estate of the copartnership, which were allowed, and against the individual estate of Alfred McCoy, which were disallowed, by the referee, "subject only to such right as said claimant may have in said estate as a creditor of the estate of the firm of A. McCoy & Company, bankrupts, after the payment of the individual creditors of the estate of said Alfred McCoy, bankrupt."

Petition for review was filed and the matter certified to the District Court for the District of Indiana, by which the decision and order of the referee were approved and affirmed. Thereupon the case was carried by appeal to the Circuit Court of Appeals for the Seventh Circuit, which reversed the judgment of the District Court and remanded the cause "with instructions to allow the claim as a debt against the individual estate

of Alfred McCoy to be paid therefrom ratably with other creditors of the estate to the extent that such debt is not paid in the administration of the estate of the firm of McCoy & Company." 150 Fed. Rep. 106.

An appeal to this court was allowed by a judge of the Circuit Court of Appeals, and the case having been docketed here was submitted on a motion to dismiss or affirm.

Mr. Harry R. Kurrie, Mr. Frank Foltz and *Mr. S. P. Thompson*, for appellant:

This record does show that the court below complied with this court's order, XXXVI, § 3, at or before the time of entering its judgment, and did make as the record shows, a finding of facts.

The court here did all that the statute required of it.

First. It stated the inferential facts, *secundum allegata et probata*.

Second. It interpreted the statute of bankruptcy, by citing authorities and by reason and analogy.

Third. It stated its conclusion of law.

Fourth. It set forth the judgment and mandate of the court. There is no recital of the testimony as to the value received, the identification of the payee, the explanation of the maker, A. McCoy & Co., or as to the appellee receiving dividends from the estate of A. McCoy & Co.

So that in the light of the findings each note is made to read "for value received by A. McCoy & Co., a firm composed of Alfred McCoy and Thomas J. McCoy, promised to pay Abner T. Bowen." This court only required a reasonable conformity to its order. The statute of bankruptcy as a scheme seeks to reach the merits of the controversy and not to enforce technicalities.

The amount involved as deposed by claimant is more than the jurisdictional amount of $2,000. The determination of the proper rule of distribution under § 5, subd. *f*, of the bankrupt law is essential to the uniform operation of the bankrupt act throughout the United States.

Mr. M. Winfield, for appellee.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

The motion to dismiss was rested on two grounds: (1) That appellant had failed to comply with clause 3 of general order in bankruptcy XXXVI; (2) That the case was not appealable to this court.

Clause 3 of general order XXXVI reads as follows:

"In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

No such finding of facts and conclusions of law was made in this case, nor was the court requested to make such finding. The appeal was a general appeal, and the entire record was sent up. The omission cannot be supplied by reference to the opinion as is attempted in argument. *British Queen Mining Company* v. *Baker Silver Mining Company*, 139 U. S. 222, and cases cited; *Lehnen* v. *Dickson*, 148 U. S. 71, 74.

But if the case was not appealable, the appeal must be dismissed, even though clause 3 had been complied with.

The bankruptcy act provides, sec. 25, *b:*

"From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States in the following cases and no other:

"1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which

might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

"2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

As to paragraph 2, there was no such certificate here; and as to paragraph 1, we are not able to perceive that a writ of error from the highest court of a State to this court could be maintained. No validity of a treaty or statute of, or an authority exercised under, the United States was drawn in question; nor the validity of a statute of, or an authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties or laws of the United States; nor was any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and decided against.

The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act. And, moreover, even if it could be held that by his claim Bowen asserted any right within the meaning of section 709, Rev. Stat., the decision was in his favor, and the trustee's bare denial of the claim could not be relied on under that statute. *New Jersey City & Bergen Railroad Company* v. *Morgan*, 160 U. S. 288.

Appeal dismissed.